TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted] 141

THE TEXAS TRANSPORT & TERMINAL COMPANY, INCORPORATED, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW ORLEANS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED OCTOBER 30, 1922.

(29,222)

(29,222)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 672.

THE TEXAS TRANSPORT & TERMINAL COMPANY, INCORPORATED, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW ORLEANS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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1 *Proceedings Had in the Civil District Court for the Parish of Orleans.*

STATE OF LOUISIANA,
Parish of Orleans,
City of New Orleans:

Civil District Court for the Parish of Orleans.

Rule.

Filed March 8th, 1922.

Civil District Court, Section "C."

No. 141,225, Docket 3.

CITY OF NEW ORLEANS et al.

versus

THE TEXAS TRANSPORT & TERMINAL COMPANY, INC., (Address) Whitney Central Bank Bldg.).

On motion of the City of New Orleans and of Richard M. Murphy, Commissioner of the Department of Finance of the City of New Orleans, by Ivy G. Kittredge, City Attorney, Rene A. Viosca, Michel Provosty, Roland B. Howell, and W. Catesby Jones, Assistant City Attorneys, suggesting to the Court that the above named defendant conducted the business of Steamship Agents at the above recited address in the City of New Orleans, without having paid to the City of New Orleans a proper license tax for the year 1922 amounting to $400.00.

And further suggesting to the Court that the gross receipts from the operation of said business were more than the sum of $100,000 for the year 1921.

And further suggesting to the Court that all persons who conduct any business without a license from the City of New Orleans after the first day of March of any year are delinquent; that the
2 said defendant has not paid to the said City the amount of license due by said defendant for carrying on said business for the years above set forth; that under the terms of the ordinances of the City of New Orleans levying the license tax for said years there is due and owing to the said City by the said defendant the amounts mentioned hereinabove for a license for carrying on said business for the said years; and that the City of New Orleans has a first lien and privilege on the property of the defendant for the security of the license tax herein claimed;

And further suggesting to the Court that it is necessary that the said defendant be ordered to present in Court for the inspection

thereof, books, written entries and memoranda, so that the license due by said defendant as hereinabove set forth be duly shown;

It is ordered that said defendant present in Court, on the 15th day of March, 1922, at the hour of 10-30 o'clock A. M., defendant's books, written entries and memoranda, and at the same time show cause why said defendant should not be condemned to pay to the City of New Orleans the sum of $400.00 as a licensse tax for the year 1922, together with two per cent per month interest on $400.00 from March 1st, 1922, and a commission of 10% calculated upon the aggregate amount of said license and penalties, with first lien and privilege upon all of the property of defendant, both movable and immovable, and why said defendant should not be enjoined from conducting said business until said amounts are paid; and that said defendant be required to show further why this rule should not be made absolute, and judgment rendered in favor of the City of New Orleans for said sum, with penalties, interest, commission and costs of court, with first lien and privilege upon the property of the defendant, and the injunction herein be perpetuated.

——— ———,
Judge.

3 March 7th, 1922.

Service accepted & citation waived.

(Signed) THE TEXAS TRANSPORT & TERMINAL CO., INC.,
By TERRIBERRY, RICE & YOUNG,
Attorneys.

If you desire to settle this claim for license call at once on E. T. Drumm, Deputy Commissioner of Public Finance, Room 2, Ground Floor, City Hall.

UNITED STATES OF AMERICA,
State of Louisiana,
Parish of Orleans,
City of New Orleans:

Before me, the undersigned authority, came and appeared Richard M. Murphy, who, being sworn, deposes and says that he is the Commissioner of the Department of Public Finance of the City of New Orleans, and that all the allegations set forth in the rule of the City of New Orleans, on the reverse hereof recited, are true and correct to the best of his knowledge and belief.

(Signed) RICHARD M. MURPHY.

Sworn to and subscribed before me this 7th day of March, 1922.

(Signed) MICHEL PROVOSTY,
Notary Public.

Answer to Rule.

Filed March 9th, 1922.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, Division "C."

No. 141,225, Docket 3.

CITY OF NEW ORLEANS, et als.

vs.

THE TEXAS TRANSPORT & TERMINAL CO., INC.

Now into court comes the Texas Transport & Terminal Co. Inc., and, for answer to the rule in the above cause, it shows:

I.

It admits that it is engaged in the business of steamship agent in the City of New Orleans.

4 II.

It admits that the gross receipts from the operation of said business during the year 1921 were more than the sum of One Hundred Thousand Dollars ($100,000.00).

III.

It admits that it has not paid to the City of New Orleans any license for conducting the business of steamship agent for the year 1922.

IV.

It denies that it owes to the City of New Orleans any license for conducting the said business for the year 1922.

V.

It shows that its business of steamship agent is exclusively confined to the representation of shipowners, charterers, and operators, whose vessels trade between New Orleans, a port within the State of Louisiana, and Eupropean ports, and also between New Orleans and ports within states other than Louisiana, and whose vessels do not trade between the port of New Orleans and any other port within the State of Louisiana, or, in other words, the defendant confines its business exclusively to the representation, at New Orleans, of principals engaged in the transportation of passengers and freight,

by water, in interstate or foreign commerce. The duties of respondent are to enter the ships at the custom house; to solicit cargo for the ships; to engage cargo for the ships; to nominate the ships for lifting the cargo; to arrange for the acceptance of delivery of cargo on the wharves; to arrange with the stevedores for loading the cargo on to the ships; to issue, in the name of its principals, bills of lading covering the cargo; to collect the freight due the ships; to pay all of the ship's disbursements; to clear the ships at the custom house, and to remit to the owners or the operators of the ships the freight collected, less the disbursements for the ships and less the commissions due the respondent for transacting such business for its principals, which commissions are based upon the gross freight collected for the owners or operators of the ships. Respondent, while the ships are in port, also attends to all matters pertaining to the immigration service, such as furnishing crew lists and securing identification cards for the seamen, and it assists the captains of the ships in all matters of local customs and regulations with which the captains are, as a rule, not familiar.

VI.

Respondent shows that the steamship agent in the various ports is absolutely essential to the transaction of the business of the ships engaged in interstate and foreign commerce; that, without such agents, the ships so occupied could not engage in the business of interstate and foreign commerce.

VII.

Respondent further shows that Ordinance No. 6608, Commission Council Series of the City of New Orleans, Section 29, and any other ordinance of the City of New Orleans, or statute of the State of Louisiana, that can be construed to impose any license upon this respondent for engaging, at New Orleans, in the business of steamship agent for principals engaged in interstate and foreign commerce, which is the only business this respondent is engaged in, are in contravention of Article 1 (Section 8) of the Constitution of the United States, known as the Commerce Clause, in that the imposition of such license would be an interference with, and a tax upon, interstate and foreign commerce.

Wherefore, the premises considered, respondent prays that the rule of the City of New Orleans and of Richard M. Murphy, Commissioner of the Department of Finance, of the City of New Orleans, be dismissed and that there be judgment in favor of respondent and against plaintiffs in rule, adjudging this respondent not liable for any license to the City of New Orleans, and declaring Ordinance No. 6608, Commission Council Series, Section 29, if said Ordinance is construed to impose any license on this respondent in connection with the business with which it is engaged, to be in contravention of Article 1 of the Constitution of the United States.

Respondent further prays for all costs of court, and for all general and equitable relief.

(Signed) THE TEXAS TRANSPORT & TERMINAL CO., INC.,
By W. H. HENDREN,
Local Manager.
(Signed) TERRIBERRY, RICE & YOUNG,
Attorneys for the Texas Transport & Terminal Co., Inc., Defendant in Rule.

STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared William H. Hendren, who, being by me first duly sworn, did depose and say:

That he is Local Manager at New Orleans for the Texas Transport & Terminal Co., Inc., the defendant in the above rule; that he has read the foregoing return and that the same is true and correct.

(Signed) W. H. HENDREN.

Sworn to and subscribed before me this 7th day of March, 1922.

(Signed) WALTER CARROLL,
[SEAL.] *Notary Public.*

Reasons for Judgment.

Filed April 21st, 1922.

Civil District Court, Division "C."

No. 141,225.

CITY OF NEW ORLEANS, et als.

vs.

TEXAS TRANSPORT & TERMINAL CO.

This is a Rule by the City of New Orleans against the de-
7 fendant for a license for transacting the business of Steamship Agent in the City of New Orleans, for the present year. The defendant in rule depends principally in his contention upon a decision of the Supreme Court of the United States, being the case of McCall vs. State of California, reported in the 136 U. S. page 104. Defendant rests his entire case upon this decision and quotes especially from the decision as follows: "A tax upon a means or occupation for carrying on interstate commerce is a tax on interstate and upon foreign commerce and an interference therewith." Defendant contends that the occupation of the defendant company is the same as that on the plaintiff in the case of McCall vs. State of California.

If the courts are bound in their decisions on all such matters by the rule in the case of McCall vs. State of California, the decision in this case would probably be for the defendant for their occupations are somewhat similar but certainly not altogether identical. I am of the opinion that the rule in the McCall case does not apply to the cause under consideration, for several reasons: In the first place, McCall, the plaintiff in error, was an exclusive agent for a railroad corporation engaged in interstate commerce, and his duty was solely to get passengers for his road for interstate traveling; he did nothing else, and it could not be said that he had any other business than that of an agent for a railroad, practically in its employ, to assist in a purely interstate business, that is, securing passengers for an interstate railroad. In the second place, the Supreme Court has practically changed, or greatly modified, the rule in such cases. In the case at bar, the defendant is engaged in the occupation of doing a general business of securing freight and performing certain functions upon its own hook, just as any other local concern would do as an occupation; it is located in the city of New Orleans, and
8 doing business in the City of New Orleans, and is receiving as a result of this local business, a certain percentage on the business it does, from any and all steamships which may take advantage of their services; it is a local business, or occupation doing business for profit in the city of New Orleans, and does not in any manner regulate or interfere with interstate commerce. Article 1, section 8, of the Constitution of the United States says that "Congress shall have power * * * to regulate commerce with foreign nations, and among the several states." This article certainly does not mean that Congress could prohibit such a legitimate business as the one in which this defendant was engaged; and certainly, if permitted to engage in such business under the laws of the State and on Congress; it does not follow that by authority of Article 1, Section 8 of the Constitution that Congress has the power to prohibit any State from collecting license imposed upon such an occupation simply because a foreign ship should see fit to benefit by the services of such occupations by simply paying a certain fee or percentage for the services. I do not think that the business of this defendant affected foreign commerce, except very remotely. The license imposed in this case does not place any burden upon interstate commerce or steamship companies doing a foreign or interstate business; it is merely one of the many operating expenses of a ship which, in no other sense, is under the regulation of Congress and there is no reason why this particular item of operating expense should come under the exercise of any power of Congress; the regulatory power of Congress over foreign and interstate commerce is for the purpose of protecting such commerce and regulating its conduct; I do not think this power was ever intended to apply to such details as are involved in defendant's duties of loading and unlaoding cargoes, securing cargoes, and so forth, for interstate steamships; these are mat-
9 ters which come under the duties of ship masters, and if local agents of different ports engage in such local occupations and if steamships buy such services from local agents or companies,

it cannot be said that such agents or companies are engaged in interstate commerce simply by reason of such services rendered for interstate ships.

The defendant in rule is engaged in a local occupation or business, and as such is subject to any license tax of the City of New Orleans levied under its revenue laws, and judgment is rendered accordingly, making the rule herein absolute.

April 21st.

(Signed) PERCY SAINT,
Judge.

Judgment.

STATE OF LOUISIANA:

Civil District Court, Parish of Orleans, Division "C."

No. 141,225, Docket 3.

CITY OF NEW ORLEANS et al.

vs.

THE TEXAS TRANSPORT & TERMINAL CO., INC.

This matter came up for trial on —— —, ——.

Present:
Ivy G. Kittredge, City Attorney;
Michel Provosty, Assistant City Attorney,
Counsel for the City of New Orleans.

George H. Terriberry, of Terriberry, Rice & Young,
Counsel for Defendants in Rule.

The law and the evidence being considered, and after hearing argument of counsel, it is ordered, adjudged and decreed that there be judgment herein in favor of the City of New Orleans and of Richard M. Murphy, Commissioner of the Department of Public Finance, in the sum of $400.00, with 2% interest, per month, from March 1st, 1922, until paid, together with a commission of
10 10% calculated upon the aggregate amount of principal and interest and for all costs of court.

It is further ordered, adjudged and decreed that the Rule taken herein be made absolute.

Judgment read and rendered in open court on April 21st, 1922.
Judgment signed in open court on April 27th, 1922.

(Signed) PERCY SAINT,
Judge.

Motion of Appeal.

Filed April 28th, 1922.

STATE OF LOUISIANA:

Civil District Court, Parish of Orleans, Division "C."

No. 141,225, Docket 3.

CITY OF NEW ORLEANS et al.

vs.

THE TEXAS TRANSPORT & TERMINAL COMPANY, INC.

On motion of The Texas Transport & Terminal Co. Inc., defendant, through its attorneys, Messrs. Terriberry, Rice & Young, and On suggesting to the Court that defendant is aggrieved by the judgment herein rendered on the 21st day of April, 1922, and signed on the 27th day of April, 1922, in favor of plaintiffs; that said judgment is contrary to the law and the evidence and that mover desires to appeal suspensively therefrom to the Supreme Court of Louisiana;

It is ordered that a suspensive appeal be granted to the said The Texas Transport & Terminal Co. Inc., defendant, returnable to the Supreme Court of the State of *the State of* Louisiana on the 26th day of June, 1922, upon said party furnishing bond, with
11 good and solvent security, in the sum of $1,000.00.

New Orleans, April 28, 1922.

(Signed) PERCY SAINT,
Judge.

Appeal Bond.

Filed April 28th, 1922.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, Division "C."

No. 141,225, Docket 3.

Know all men by these presents, That we, The Texas Transport & Terminal Co. Inc., as principal, and Union Indemnity Company as surety are held and firmly bound unto John J. O'Neill, Clerk of the Civil District Court for the Parish of Orleans, his successors, executors, administrators and assigns, in the sum of One Thousand Dollars ($1,000.00), for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents, dated in the

City of New Orleans, on this 28th day of April, in the year of our Lord one thousand nine hundred and twenty-two.

Whereas the above bounden The Texas Transport & Terminal Co. Inc., have this day filed a motion of appeal from a final judgment rendered against it in the suit of City of New Orleans, et als. vs. The Texas Transport & Terminal Co. Inc., No. 141,225 of the Civil District Court for the parish of Orleans on the 21st day of April, 1922, and signed on the 27th day of April, 1922.

Now the condition of the above obligation is such, That the above bound- The Texas Transport & Terminal Co. Inc., shall prosecute its appeal, and shall satisfy whatever judgment may be rendered against it or that the same shall be satisfied by the proceeds of its estate, real or personal, if it be cast in the appeal; otherwise that the said Union Indemnity Company shall be liable in its place.

12 THE TEXAS TRANSPORT & TERMINAL CO., INC.

(Signed) W. H. HENDREN,
Local Manager.

" UNION INDEMNITY COMPANY,

[SEAL.] By T. E. SPRAGUE,
Agent and Attorney in Fact.

Signed, sealed and delivered in the presence of
(Signed) H. ARATKEE.
" GEO. H. TERRIBERRY.

Præcipe for the Transcript.

Filed May 1st, 1922.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, Division "C."

No. 141,225, Docket 3.

CITY OF NEW ORLEANS et als.

vs.

THE TEXAS TRANSPORT & TERMINAL CO., INC.

Præcipe for the Transcript.

In making up the transcript of record in the above cause, the clerk of the Civil District Court will please include the following:

1. The rule of the plaintiffs.

2. The answer or return of the defendant.

3. The testimony of W. H. Hendren, M. J. Sanders, N. O. Pedrick and Robt. A. Warriner.

4. The opinion of the Court.

5. The decree.

6. The motion and order of appeal.

7. The bond.

(Signed) TERRIBERRY, RICE & YOUNG,
Attorneys for Defendant in Rule.

13 STATE OF LOUISIANA:

Civil District Court, Parish of Orleans, Division "C."

No. 141,225.

CITY OF NEW ORLEANS

vs.

TEXAS TRANSPORT & TERMINAL COMPANY, INC.

Testimony in the Above Entitled and Numbered Cause, Taken in Open Court on March 29, 1922, Before the Honorable Percy Saint, Judge, Acting for the Honorable E. K. Skinner, Judge of Division "C," Absent on Leave.

Appearances:

For the plaintiff: Michel Provosty, Esq.
For the Defendant: George H. Terriberry, Esq.

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William H. Hendren ..... Page 15

Filed April 11, 1922.
(Signed) R. S. SKINNER,
Dy. Clerk.

Reported by Henry J. Gassie, Official Reporter.

14 The following facts are stipulated to be true:

The City of New Orleans, plaintiff in rule, through its Commission Council, duly enacted Ordinance No. 6608, Commission Council Series, and said Ordinance is a license law for the City of New Orleans for the year 1922, and its purpose is to raise revenue for the City of New Orleans.

Richard M. Murphy, also plaintiff in rule, is the Commissioner of the Department of Finance of the City of New Orleans, and is charged with the duty of collecting the revenue due under Ordinance No. 6608.

Under the provisions of Ordinance No. 6608, defendant in rule is required, as a condition to its acting as steamship agent in the City

of New Orleans, to procure from the City of New Orleans a license to do so.

Ordinance No. 6608 provides that "if the tax payer does not procure such license, it shall be enjoined from engaging in business in New Orleans." The effect of the Ordinance, therefore, is that, if the City of New Orleans can exact such license from the defendant in rule, and if defendant in rule does not pay such license, defendant in rule should be enjoined from acting as steamship agent in the City of New Orleans.

The licenses to be procured and paid for under Ordinance No. 6608 are graded according to the gross receipts of the taxpayer for the previous year, and any one acting as a steamship agent, whose gross receipts for the previous year were $100,000.00 and over, is required to pay $400.00 to the City for the license.

The gross receipts of defendant in rule from its business of steamship agent in 1921 were $100,000.00 and over. Defendant in rule has refused to pay and has therefore not paid the license of $400.00 for the year 1922 demanded in this rule, and the defendant became delinquent in such respect on March 1st, 1922.

15 WILLIAM H. HENDREN, being first duly sworn, testified as follows:

Direct examination.

Mr. Terriberry:

Q. Your position is what, Mr. Hendren?

A. Local Manager of the Texas Transport & Terminal Company, Incorporated.

Q. What is the business of that corporation?

A. That corporation is engaged in the steamship agency business.

Q. You as agent act in the port of New Orleans for what line?

A. For the Compagnie Generale Transatlantique, commonly known as the French Line; the Holland-American Line and the Toyo-Kisen-Kaisha, and the Navigazione Generale Italiana.

Q. Mr. Hendren, between what ports do the ships of the French Line trade?

A. The French Line carries passengers and freight between here and transatlantic ports, that is, Havre, Bordeaux, Antwerp, Hamburg and Bremen.

Q. In both directions?

A. In both direction-.

Q. Now, what trade do the Holland-American line ships engage in?

A. They carry passengers and freight between here and Rotterdam and Amsterdam, Holland.

Q. In both directions?

A. In both directions.

Q. And the Navigazione Generale Italiana?

A. The Navigazione Generale Italiana line is engaged in freight business only between here and Mediterranean ports.

Q. Then, occasionally you act as agent for some tank steamers, do you not?

A. Yes, sir.

Q. And between what ports do those steamers operate?

16 A. Those steamers operate between here and Baton Rouge and foreign ports, for the most part. We have had an occasional—I cannot recall at this time but one steamer that went to a North Atlantic port—either Philadelphia or New York.

Q. Well, do you mean that tank steamers transport cargo between New Orleans and Baton Rouge?

A. Oh, no, they take cargo from Baton Rouge and from New Orleans to those ports.

Q. To what ports?

A. We have no steamers at all plying from one port to another in the State of Louisiana proper.

Q. Well, when you say——

A. That is, operating between ports wholly in the State of Louisiana.

Q. Well, do you represent any steamers that operate, in the sense of carrying freight or passengers, between ports in the State of Louisiana?

A. We do not.

Q. Well, then, when you say that you act as agent for tankers that trade between Baton Rouge and New Orleans and foreign ports, you mean that the cargo lifted at Baton Rouge is taken thence to foreign ports or in the other direction, that lifted at foreign ports, brought to Baton Rouge, and that cargo that is lifted at New Orleans is taken to foreign ports or ports of States other than the State of Louisiana, or that cargo is lifted at foreign ports or in ports of States other than Louisiana, and brought to New Orleans? Is that what you mean?

A. Yes. I mean that they do not have any cargo—tankers do not bring any cargo coming this way at all. They take it entirely from here across.

Q. I just wanted to straighten out your statement that you represented ships that plied between New Orleans and Baton Rouge and other ports. What do they do between New Orleans and

17 Baton Rouge?

A. They do not take any cargo at all. In fact, the boats that come here do not go to Baton Rouge. Usually they go thru from Port Eads to Baton Rouge.

Q. Then, let us keep the thing clear. You mean that you sometimes act as agent for ships that transport cargo from Baton Rouge to the ports of other States?

A. Occasionally, as I have said before. I think I recall one vessel plying—that is, doing interstate business, from Baton Rouge or from Louisiana, with North Atlantic ports—either Philadelphia or New York, I don't remember which.

Q. Do you represent any principal who operates any ships that carry either passengers or freight between any two ports within the State of Louisiana?

A. Absolutely not.

Q. Do all the principals that you represent operate ships that are engaged in the transportation of passengers or cargo between a port in the State of Louisiana and ports in foreign countries or ports in States other than Louisiana? Is that right?

A. That is right.

Q. Now, Mr. Hendren, as a steamship agent for those principals that you represent, it is your duty to enter the ships at the customhouse, is it not?

A. It is.

Q. You solicit cargo for the ships, do you not?

A. Yes, sir.

Q. Do you engage cargo for the ships?

A. I do.

Q. You nominate the ships of your principals for lifting cargo?

A. Yes.

Q. You arrange for the acceptance of the delivery of the cargo on the wharfs?

A. Yes, sir.

18 Q. You arrange for the bunkering and supplying and equip-ing of the ships?

A. Yes, sir.

Q. You arrange with the stevedores for discharging inward cargo from the ships?

A. Yes, sir.

Q. You arrange with them also for loading the outward cargo on to the ship?

A. Yes, sir.

Q. And you issue, in the names of your principals, bills of lading covering the cargo?

A. Yes, sir.

Q. You collect the freight due the ships for transporting cargo?

A. I do.

Q. You clear the ships at the customhouse?

A. Yes, sir.

Q. You remit to the owners of the ships the freight collected, less disbursements of the ships and less the commissions due you for transacting such business for your principal?

A. I do.

Q. Are those commissions based upon gross freight collected for the owners of the ship by you?

A. They are.

Q. Now, while ships are in port, you attend to all matters pertaining to the immigration service, do you not?

A. Yes.

Q. You furnish crew lists and secure identification cards for the seamen?

A. Yes, sir.

Q. And you assist the masters in matters of local customs and regulations?

A. Yes, sir, very materially, as I find they are very deficient in their knowledge of local customs.

19 Q. Now, your compensation for all those services is a percentage of the freight that is due your principal for transporting passengers and cargo, is it not?

A. It is a percentage of the gross freight.

Q. Mr. Hendren, how long have you been in the steamship business—steamship agency business?

A. I have been in the steamship agency business since 1896.

Q. All steamships engaged in interstate and foreign commerce have agents, have they not?

A. They do.

Q. Could they transact their business in the ports without agents?

A. I think they would find it a very difficult matter to do so. In fact, I don't consider it possible for them to do it.

Q. Each owner could own only one ship, and would have to go with it everywhere, would he not, if he did the business himself?

A. Well, not necessarily. If he had a competent captain, he might get along in a fashion, but he would not handle matters in the manner in which they should be done. It would be impossible for him to do it without knowing the local conditions.

Q. They pay you a commission to do that for them?

A. Yes, sir.

Q. Well, the master himself is an agent—is bailee or agent for the owner?

A. Yes, sir.

Q. So the owner must, unless he goes around with the ship himself, act through some agent, whether it is the master or some other agent?

A. Yes, sir. I would like to make one statement in connection with the commission. I said awhile ago that our remuneration was on a percentage basis on the gross freight. Now, that applies to regular cargo vessels. It does not apply to tankers. In case
20 of tankers, and sometimes cargoes of sugar—full cargoes—the vessels are handled on a lump sum basis—so much for handling the steamer.

Q. It comes out of the freight, though, does it not?

A. Yes, it comes out of the freight. We always take credit for him and make drafts on the owners for any difference that might be due.

Q. Apart from your method of collecting it, it comes out of the treasury of your principal who is engaged in interstate or foreign commerce?

A. Yes, sir.

The Court:

Q. Mr. Hendren, is the Texas Transport & Terminal Company engaged in interstate commerce, either through ownership of vessels or by charter of vessels?

A. No, sir.

Q. Are you the employe of any company you represent or do you do a general steamship agency here for any steamship line that you can get as client?

A. I am employed only by the Texas Transport & Terminal Company Incorporated, and we simply act as agent for these various lines.

Mr. Terriberry: We admit that they are very willing to act for all the principals that will engage their services.

A. (continued). I would like to explain—I don't know whether it is clear in your mind, your Honor—that we do not own any vessels at all. The Texas Transport & Terminal Company are not owners of any vessel. We simply act as agent. We very seldom charter. We do not own any vessels and we very seldom charter a vessel. In fact, I do not think we have chartered a boat for five or ten years. We act simply as agent for those vessels.

The Court:

Q. In other words, you are not engaged in interstate commerce, yourselves; you are merely agent or representative of the ves-
21 sels? You act as general agent in such matters?

Mr. Terriberry: Not as general agents.

The Court: What I mean by the word "general"—it is rather more comprehensive than it should be—what I mean is that it is general in the sense that you render services to anybody and take agency from anyone from any port in the world?

A. Yes, sir.

Mr. Terriberry: As an agent.

Cross-examination.

Mr. Provosty:

Q. Mr. Hendren, you testified that you were representative of the Compagnie Generale Transatlantique. What is the form of your agency? Is it by letter or written document or how is it?

A. Well, we are regularly appointed agents for that line. They appointed us through their general manager in New York. We are empowered, as agent of that line, to transact any business for them in the port of New Orleans.

The Court:

Q. In other words, Mr. Hendren, the Compagnie Generale Transatlantique, to which Mr. Provosty refers, is one of your clients, as a steamship agent, you being their steamship agent?

A. That is right.

Q. That company is one of the clients of the Texas Transport & Terminal Company?

A. It is, yes, sir.

Mr. Provosty:

Q. Mr. Hendren, you testified that you also represented the Holland line and the Italian line and also another line the name of which I did not catch?

A. Yes, sir, the Toyo-Kissen-Kaisha line—the Japanese line.

Q. Your agency of all these lines is on the same basis?

A. On identically the same basis. The remuneration is the
22 same on all lines.

Q. Is the contract of agency made by you or by your home office?

A. The contract of what?

Q. The contracts with those lines?

A. The contracts with the lines?

Q. Yes.

A. That was arranged through our general manager, Simpson, Spence & Young, New York. They are General Manager of the Texas Transport & Terminal Company, Inc. They also, Simpson, Spence & Young——

Mr. Terroberry: Let's not get into that.

Mr. Provosty:

Q. Mr. Hendren, you testified that you were also agent occasionally for other steamship lines. That is correct, is it not?

A. That is, not exactly steamship lines, but occasional vessels. A "tramp," for instance, might be sent out to us to load on the berth, and we might be told to secure cargo. They give us a free hand to secure cargo, and do the best possible for the vessel. Our remuneration is the same in that case.

Q. How does this agency come about for those tramp steamers you speak of?

A. Usually, our foreign officers or Simpson, Spence & Young—they secure the tramp vessels. They will go to some owner, say, in West Hartlepool, Liverpool or London, and tell them that there is a good opportunity of loading a vessel on berth for some given port, and they will send that vessel out to us. They will consign that vessel out to us. Usually she comes in ballast, and we engage cargo and look after her just exactly in the same manner as we would a regular line vessel, and for the same remuneration.

Q. You are just the local agents of Simpson, Spence & Young?

A. I am local agent of the Texas & Terminal Company, In-
23 corporated, but Simpson, Spence & Young are General Managers of the Texas Transport & Terminal Company, Inc.

Q. Now, then, the tankers you speak of, do you handle those on the same basis as tramp ships?

A. No; they are usually handled on a lump sum basis—so much per steamer.

Q. I mean, the agency comes about in the same way, does it not?

A. The ship is controlled in the same way, yes, sir.

Q. Now, then, Mr. Hendren, you said that your duties consisted in entering the ship at the customhouse. What does that act consist of?

A. Well, the customhouse clerk has to go down with the captain and make a proper entry, as required by the customs, of the vessel.

Q. You testified that your duties consisted in nominating the ship for lifting cargo. Now, what does that consist of?

A. That means this: The French line—say that they will have four vessels during a specified period. Now, they leave it to me about saying for what ports I will load those vessels; that is, ports, naturally, tributary to their territory—transatlantic—Antwerp, Hamburg and Bremen.

Q. You testified you solicited cargo for the ships. What does that consist of?

A. That means that we go to the brokers in the port and place the vessel before them—shippers as well, and place the vessel before them, and solicit cargo for those vessels for certain rates.

Q. Are you authorized to vary in your rates—to go up and down?

A. Yes, sir.

Q. You make a deal with the shippers or ship brokers, do you not?

24 A. Yes, sir.

Q. Then you testified that you arranged for the acceptance of the delivery of the cargo on the wharves. What do you mean by that?

A. That means—take the case of cotton. It is sent down by drays usually, sometimes in cars. The material is sent there in cars and then stuff is discharged by the ships and placed on the wharf. We get it and take it over and give them a receipt for it.

Q. Does your company handle the freight, Mr. Hendren, or, rather, handle the cargo, I should say?

A. You mean, we ship our cargo——

Q. No, no, I mean to say, does your company handle the cargo? Does it bring it from the ship to shore or from the shore to the ship?

A. No; we have stevedores employed for that purpose. The stevedores load the cargo and also discharge it from the vessel.

Q. Are the stevedores a part of your company?

A. The stevedore firm is a subsidiary of the Texas Transport & Terminal Company. I would like to explain, Mr. Provosty, that by saying it is a subsidiary of the company, that it operates under the firm of J. P. Florio & Company, Inc., and not under the style of the firm of the Texas Transport & Terminal Company.

Q. You testified that you arranged for the bunkering and supplying and equipping of the ships. Now, what do you mean by that?

A. I mean bunkering them with oil or coal. Some vessels are oil burners. We have to arrange with the parties supplying oil or coal, under contracts usually, or very often, made by the companies themselves, but in most cases by us, with their authority, for the delivery of oil or coal to the vessel, and then, so far as the fitting of the vessels is concerned, that means that if the vessel is carrying grain, she has to be fitted for the proper carriage of grain.

25 She has to be fitted up in the proper manner, and we have to employ means for that purpose.

Mr. Terriberry:

Q. When you say "we," you mean, on behalf of your principal?
A. On behalf of our principal, naturally. Everything we do is by their authority.

Mr. Provosty:

Q. Now, then, you testified that you issued bills of lading covering cargo—that you issued those bills of lading in the name of your principals. What principals do you mean?
A. I mean the Compagnie Generale Transatlantique or the Italian Line, or the Japanese. I might explain that we have authority from those lines—that we are vested with authority from those lines to issue those bills of lading.
Q. Now, then, you testified that you collected the freight due the ships for transporting cargo. What do you mean by that?
A. I mean that if Mr. C. B. Fox, for instance, were to have a shipment of grain going to Havre or to any foreign port, and the freight on that grain was to be prepaid, before the issuance of the bill of lading, he would give us a certified check for the freight.
Q. What would you then do with the money?
A. We would deposit the money until the vessel actually sailed, and then we would have to account to the owners for it, and in fact, the entire prepaid freight on the vessel, less disbursements of the vessel while in port, and less our commissions.

Mr. Terriberry:

Q. You would remit to the owners?
A. We would remit to the owners, yes, sir.

26 Mr. Provosty:

Q. You would deposit the money in a New Orleans bank?
A. Yes, in New Orleans banks.
Q. Do you remit directly to the owner, or to the home office?
A. No; we generally remit direct.
Q. Do you sometimes remit to the home office?
A. Very seldom; nearly always direct.
Q. Now, then, you spoke of paying the ship's disbursements out of the freight. What did you mean by that?
A. I mean all of her expenses while she is in port—wharfage and shed hire and stevedores and our tally clerk and custom-house expense—in fact, all expenses that the vessel incurs—cost of bunkers and all expenses incurred by the vessel while she is in port. I might say that those bills have to be approved, or such of them as are available at the time of the sailing of the vessel, by the captains of the vessels.
Q. When you act as agent for tankers and tramp steamers, do you remit in the same way, or do you remit through your principals in New York?

A. We remit in the same way.

Q. I want to make this clear, Mr. Hendren. Your company does not handle the cargo itself, or does it?

A. You mean by that, that we do not purchase cargo and ship our own cargo?

Q. No, I mean that when the cargo is moved from the ship to the wharf, or from the wharf to the ship, or from the wharf to the warehouse, is it done by your company, or by someone else?

A. It is done by the *set*vedores. The stevedores look after that. They look after all the physical handling of the cargo, both outward and inward cargo.

Q. That is done by the stevedores?

A. By the stevedores.

Q. Your company in no way participates in the profits of the steamship line, does it?

27 A. No.

Q. And do the steamship lines participate in the profits of your company?

A. No. I would like to point out, Mr. Provosty, that I am speaking of the regular lines that we handle. Now, if we were chartering a vessel and there should be a profit on her, we would participate in it; but, as I said before, we have not chartered a vessel for many years.

Mr. Terriberry:

Q. There is no effort in this rule to demand a license of you as a charterer of vessels, but only as an agent of vessels?

A. I see.

Mr. Provosty:

Q. Now, then, to sum up, Mr. Hendren, the contract of agency between the various lines and your company is made by the home office, is it not?

A. Made by the home office.

Q. So that if a French steamer, for instance, were to come here and employ another agent than yourself, your procedure would be to ascertain from the home office whether you are still representing that same French line? Would not that be your procedure?

A. Yes, but I do not think such a thing could be possible under the contract the French line have with our company. They obligate themselves to give us all vessels coming to this port. They could not consign one of their vessels to another agency. They might charter one of their vessels and handle it as charterer, but not as a berth vessel.

Mr. Terriberry:

Q. You spoke of the home office of the Texas Transport & Terminal Company. Where is that?

A. New York.

Q. Now, your office is a branch office, is it?
A. Yes.
Q. You have similar arrangements in various ports of the
28 world, have you not?
A. We have Texas Transport and Terminal Company offices in Port Arthur, Galveston, San Francisco, Savannah and Baltimore.
Q. In all of those ports it acts as agent for the same people in the trade there?
A. Yes.
Q. I neglected to ask you between what ports the steamers of this Japanese line ply?
A. They carry freight only between here and Far East ports—Kobe—Well, Japanese and Chinese ports, you might put it.
Q. Now, Mr. Hendren, Mr. Provosty asked you about the physical headling of the cargo. You said the stevedores handled it. The stevedores are the employes, in that respect, of the principal of the ship, are not they?
A. Yes, sir.
Q. Of the owner of the ship?
A. Yes, sir.
Q. It is the duty of the ship to discharge and load cargo, is it not?
A. It is.
Q. And she does it through the work of the stevedores?
A. Yes, sir.
Q. And you direct the stevedores to take the job and engage him to do it for your principal?
A. That is correct.
Q. Now, Mr. Hendren, as a ship agent, does the Texas Transport & Terminal Company, or does it not, as ship agent for those ships, in connection with interstate commerce, pay a license to the United States Government?
A. I think not.
Q. Is there a fee of $50.00 charged as a ship broker?
A. I don't know. I think there is. I am not positive of that.

29 Civil District Court for the Parish of Orleans, Division "C."

No. 141,225.

CITY OF NEW ORLEANS
VS.
TEXAS TRANSPORT & TERMINAL COMPANY, INCORPORATED.

Testimony and notes of Evidence in the above entitled and numbered cause, taken in open court on April 11th, 1922, before the Honorable Percy Saint, Judge, acting for and on behalf of the Honorable E. K. Skinner, Judge, Division "C," absent on leave.
Filed April 11, 1922.
(Signed) R. S. SKINNER,
Dy. Clerk.

Appearances:

For the Plaintiff: Michel Provosty, Esq.
For the Defendant: George H. Terriberry, Esq.

Reported by Henry J. Gassie, Official Reporter.

Mr. Terriberry: Counsel for defendant in rule offers in evidence the testimony of Mr. M. J. Sanders, Mr. Norman O. Pedrick, and Mr. Robert A. Warriner, taken by consent out of court, on April 5, 1922, at the office of George H. Terriberry, in the Whitney Central Building, New Orleans, Louisiana, subject to the objections noted at the time of the taking of the said depositions.

30 Civil District Court for the Parish of Orleans, Division "C."

No. 141,225.

CITY OF NEW ORLEANS

vs.

TEXAS TRANSPORT & TERMINAL COMPANY, INC.

Testimony and Notes of Evidence in the Above Entitled and Numbered Cause, Taken on Behalf of Defendant in Rule, The Texas Transport and Terminal Company, Incorporated, by Consent, Out of Court, at the Offices of Messrs. Terriberry, Rice & Young, Whitnew Central Building, New Orleans, Louisiana, on April 5, 1922.

Appearances:

For the Plaintiff: Michel Provosty, Esq.
For the Defendant: George H. Terriberry, Esq.

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M. J. Sanders 31
Norman O. Pedrick 35
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Reported by Henry J. Gassie, Shorthand Reporter.

31 M. J. SANDERS, being first duly sworn, testified as follows:

Direct examination.

Mr. Terriberry:

Q. What is your business, Mr. Sanders?
A. Steamship manager.
Q. You manage what company?

A. Managing the office at New Orleans of the International Mercantile and Marine Company, who handle their own steamers, which is the Leland Line, and act as agent for other steamers as well—for steamers of other owners, as well.

Q. And the ships that they act as agents for transport passengers and cargo in interstate and foreign commerce?

A. Yes, sir.

Q. How long have you been a steamship agent?

A. Thirty seven years.

Q. In those thirty seven years you have devoted your time and activities exclusively to the steamship business?

A. Not exclusively, but mainly to the steamship business.

Q. Well, almost entirely?

A. I have been a steamship agent continuously for thirty seven years in the port of New Orleans.

Q. Now, Mr. Sanders, based upon your experience, please state whether, in your opinion, a steamship agent is necessary to the conducting of the business of principals engaged in transporting passengers and cargo by water in interstate and foreign commerce?

Mr. Provosty: Counsel for plaintiff in rule objects to this question on the ground that it is an expression of opinion by the witness, and not the statement of a fact.

A. An agent is as essential for a steamer as is the coal that drives the steamer to and from the port. His duties are those which cannot be performed by any other party. His main duty—do you wish me to elaborate, Mr. Terriberry?

32 Q. Yes, go on and just state your conclusion, in answer to the question.

A. The most important duty which an agent has is to engage and book the freight for the loading of the vessel, and to have it ready for delivery to the steamer on her arrival. He has other very important duties, such as the handling of the cargo itself, and the loading and discharging, arranging of berths, handling of the finances, and that sort of thing. Without an agent, the business could not possibly proceed in the form which is customary to-day. Therefore, an agent is undoubtedly essential for the steamship business as conducted in the ports of America to-day.

Cross-examination.

Mr. Provosty:

Q. Mr. Sanders, is the master of the ship the agent of the owners of the ship?

A. The Master is an agent of the owner with limited duties. The Master of the ship today has duties very much limited as compared with what they were a generation ago, and very different. The Master of the average ship today has practically no duty after his ship reaches port, except the supervision of his crew.

Q. Is it possible for the Master of a ship to enter his ship at the Customhouse?

A. Quite possible, but very impractical under modern conditions.

Q. Is it sometimes done?

A. At small and undeveloped ports, yes. At small and undeveloped ports, but not in the United States—not except by an occasional tramp ship, that amounts to very little to the commerce of the country.

Q. Is it possible for the Master of the ship to do all of the duties which the steamship agent is called upon to do?

A. No; the master of the ship cannot possibly engage the
33 freight for the ship, and have it ready for the ship on her arrival. The trade of the United States today, as of all the well developed countries, is done weeks beforehand. The goods are sold weeks before the ship reaches the port. The goods have usually to be sent from the interior to the port before the ship arrives. All of that necessitates having somebody residing in the port and doing the business weeks before the ships get here.

Q. Mr. Sanders, is it possible for the Master to arrange for the acceptance or delivery of cargo on the wharves?

A. Not under present conditions at this port.

Q. Why not, Mr. Sanders?

A. Because he is not aware of the customs. He has not the time to do it. It has to be done before he arrives. If you depended upon the old system of forty years ago to do the business of the port today, you would never get through one-fiftieth part of the traffic that is handled, because the ship, instead of being here and finding her cargo ready, and getting out in a week's time, as is necessary, would probably be a month waiting for cargo to come before she commenced loading, which is, of course, entirely impractical, under modern methods.

Q. Is it possible for the Master to arrange for the bunkering and supplying and equipping of a ship?

A. Yes, that is possible. Those are the smaller duties of an agent.

Q. Is it possible for him to arrange with the stevedores for the discharging of inward cargo from the ship and for the loading of the outward cargo to the ship?

A. Possible, quite.

Q. Is it possible for the Master of the ship to issue in the name of his principal bills of lading on the cargo?

A. Yes, sir.

Q. Is it possible for the Master of the ship to attend to matters pertaining to immigration service, such as the furnishing of
34 crew lists, and securing of identification cards for the seamen?

A. Yes, it is possible.

Redirect examination.

Mr. Terriberry:

Q. Mr. Sanders, by the agent booking cargo in advance of the arrival of the ship in port, and accumulating that cargo on the docks, the ship is saved a great deal of despatch is she not?

A. Oh, yes, of course, weeks, possibly, you might say—sometimes months.

Q. Likewise, isn't it a fact that after the inward cargo is discharged from the ship, that the delivery to the consignees is effected after the ship has sailed?

A. Frequently, very frequently.

Q. Isn't that very common?

A. Very frequently.

Q. And otherwise, if the Master were agent for the ship's owner, attended to that, he would be delayed in his sailing, would not he?

A. Unquestionably.

Q. Would it be practical for steamship operators to render the commerce of the country the service they now render, even in any measurable degree, without a steamship agent?

Mr. Provosty: Same objection.

A. I did not quite catch that question.

Mr. Terriberry:

Q. (Question repeated as above recorded.)

A. By steamship operators, do you mean steamship owners?

Q. Well, the carrier, I mean.

A. If you put the word "carrier," I understand. Would it be possible for ocean carriers,—is that what you mean?

Q. Yes.

A. Absolutely no. If we reverted to the old method of the
35 captain engaing the cargo and doing the ship's business, we should have to reduce the volume of traffic flowing from the United States ports to about one-fourth of its present volume, and we should require accommodations in the port of New Orleans for tonnage three or four times as great as we have today, to handle the same volume of traffic.

NORMAN O. PEDRICK, being duly sworn, testified as follows:

Direct examination.

Mr. Terriberry:

Q. Mr. Pedrick, you reside in New Orleans?

A. Yes, sir.

Q. What is your business?

A. I am general manager of the Mississippi Shipping Company, Incorporated.

Q. What is the business of the Mississippi Shipping Company?

A. The Mississippi Shipping Company, Incorporated, operates steamers for account of the United States Shipping Board, and also acts as agent for other owners or steamships calling at the port of New Orleans.

Q. How long have you been in the steamship agency business?

A. Twenty nine years.

Q. At what ports have you had experience?
A. At Norfolk for nine years, and New Orleans for twenty years.
Q. Based upon that experience, will you please state what your opinion is as to the necessity of the steamship agent to the carrier by water engaged in interstate and foreign commerce?

36 Mr. Provosty: Counsel for the City of New Orleans objects to the question on the ground that it calls for an expression of opinion, and not the statement of a fact, and renews the same objection to all such questions.

A. My opinion is that the business could not be carried on without the employment of steamship agents. Modern conditions of foreign trade are such that unless there were a resident agent at the port, cargo could not be booked, it could not be assembled, wharf facilities could not be arranged, and, in fact, it would be impracticable for any owner to send a steamer to a port with the idea of loading cargo unless he employed an agent to attend to those matters in advance.
Q. The ships get infinitely better dispatch by reason of having an agent?
A. They do. They not only would not get dispatch, but they could not get the cargo, for the reason that, under present conditions, there is very little of what we call local business compared with other business originating in the interior. The exporter engaged in foreign trade, in order to sell in competition with exporters at other parts of the country, must know on what ocean rate he can figure, on how much room he can depend, and when the steamer will be ready to receive his cargo. There is no one but an agent at the port who could give him this information.

No cross examination.

ROBERT A. WARRINER, being duly sworn, testified as follows:

Direct examination.

Mr. Terriberry:

Q. Mr. Warriner, you reside in New Orleans?
A. Yes, sir.
Q. What is your business?
A. Steamship agent.
37 Q. You are President of——
A. Of M. & R. Warriner, Inc.
Q. How long have you been in the steamship agency business?
A. Since 1892.
Q. And at what ports have you acted?
A. Always here.
Q. In New Orleans?
A. In New Orleans, with supervision over Galveston and Mobile.
Q. You have branch offices at Galveston and Mobile, have you?

A. We did have, prior to the war; since the war we have given them up.

Q. Based upon your experience, Mr. Warriner, will you please give us your opinion as to whether the steamship agent is a necessity to the carrier engaged in the transportation of freight and passengers by water in interstate and foreign commerce?

Mr. Provosty: Counsel for the City of New Orleans objects to the question on the ground that it calls for an expression of opinion, and not for the statement of a fact, and makes the same objection to all such questions.

A. Business cannot be done without a steamship agent. It would result in chaos and confusion without end, on account of such a large quantity of business originating in the interior, all of which has to be arranged for ahead. If we were to wait for the Master to arrive, or had no agent here, it would be impossible for the Master at the present day to engage cargo at all. As a matter of fact, when the steamers are running now, especially regular lines, the Masters have instructions to apply to their agents for cargo, and they have nothing whatever to do with the rate-making or selecting of cargo, in any shape or form.

Q. Well, Mr. Warriner, if ships generally came to the port and had no agent,—no resident agent at the port,—just tell us
38 what would take place in a practical way, in the handling of the business?

A. In a practical way, the owner would go broke. That is the practical end of it.

Q. Well, as a matter of fact, there would not be any business for the ship until the ship arrived, would there?

A. No, there could not be. If there were no agent there could be nothing done.

Q. Then the Master would have to look for cargo, would he?

A. The Master would then have to look around for his cargo. He would not know where to go, or how to go, or who to look for, or what rate to ask.

Q. And he would have to start on that task, just where his agent, if he had one, would have been active for a month or two ahead, would not he?

A. Yes, from a month to a year.

Q. About how long, as a general matter, do you book cargo for shipment, in advance?

A. Oh, a great deal of our cargo we have booked over the season.

Q. What do you mean by that, so that the Court will understand?

A. Well, take the cotton trade from September to April; take the grain trade, for any number of months that it may be agreed upon. That is cargo not designated for any special ship of the line, but to be apportioned as the owners may send boats along.

Q. But it is usually designated as to what month the ship must be here, isn't it?

A. Oh, yes, it is always designated as to the time of shipment.

Q. And that is commonly a month or two ahead?
39 A. Yes, from month to month.
Q. And then, after you make those bookings for your line, you nominate a ship to lift them?
A. That is it. To illustrate it, there is cargo offering today for September shipment.
Q. For shipment in September, 1922?
A. Yes, sir.
Q. And bookings are being made now by the agents?
A. Bookings can be made by the agents.
Q. Mr. Warriner, is not it the common practice of the ports to pay the agents for the services they render, a commission based upon the gross freight?
A. Yes, sir.
Q. And the agent gets that on whatever freight is earned?
A. Yes, sir.
Q. Regardless of whether the owner makes a profit out of the venture or not?
A. Decidedly.

Cross-examination.

Mr. Provosty:

Q. What line do you represent, Mr. Warriner?
A. We represent the Furness Withey & Company, Limited, the Elder-Dempster Company, and Booth & Company. That is about all.

Mr. Terriberry:

Q. In addition to that do you sometimes represent steamers which merely come to New Orleans—make an occasional trip to New Orleans?
A. Well, there are no such boats now that come seeking any more. What you call a "tramp vessel" is generally fixed. You might fix her now for October loading, or by charter.
Q. So you represent two lines?
A. Three lines.
Q. Does it sometimes happen that your company will book
40 freight for one of those lines and subsequently transfer it to another line represented by you?
A. Only by the owner's consent.
Q. So the moment you book freight for a special day in the future, you notify the owners?
A. Yes, sir, by cable.
Q. But it does happen that you transfer the freight from one company to another after having first obtained the consent of the owner?
A. Yes, that can happen and has happened.
Q. Now, in the soliciting of freight, or, rather, your company does solicit freight, does not it?
A. Yes, sir.

Q. In soliciting freight, do you state for what company you are soliciting it?
A. Yes, sir.
Q. And you then and there book it for that particular company?
A. Yes, sir.

41 STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I, W. W. Cummings, Deputy Clerk of the Civil District Court for the Parish of Orleans, do hereby certify that the foregoing forty-two (42) pages, do contain a true, correct and complete transcript of all the proceedings had, documents filed and evidence adduced upon the trial of the cause entitled "City of New Orleans et als. Versus The Texas Transport & Terminal Co. Inc., instituted in this Court and now in the records thereof under the No. 141.225 of the docket, Division "C," Honorable Percy Saint, Judge. (Made up in accordance with instructions of counsel, filed May 1st, 1922, and copied on page 11 of this transcript.)

In Testimony Whereof, I have hereunto set my hand and affixed the impress of the seal of said Court, at the City of New Orleans, on this 4th day of May, in the year of our Lord, One thousand, nine hundred and 22, and in the one hundred and 46th year of the Independence of the United States of America.

(Signed) W. W. CUMMINGS,
[SEAL.] *Deputy Clerk.*

42 *Proceedings Had in the Supreme Court of the State of Louisiana.*

(Transcript of Appeal Filed.)

Filed May 4th, 1922. (Signed) Percy J. Heines, Deputy Clerk.

Supreme Court of the State of Louisiana.

No. 25294.

CITY OF NEW ORLEANS et al.

vs.

THE TEXAS TRANSPORT & TERMINAL CO., INC.

(*Motion to Fix and Order.*)

Supreme Court of Louisiana.

No. 25294.

CITY OF NEW ORLEANS et al.

vs.

THE TEXAS TRANSPORT & TERMINAL CO., INC.

On motion of The Texas Transport & Terminal Co., Inc., defendant and appellant, through its attorneys, Messrs. Terriberry, Rice & Young, and

On suggesting to the Court that this case involves the constitutionality or legality of a license tax, and that mover desires to have it fixed for trial by preference and at as early a date as possible, and on further suggesting that mover has filed its briefs herein and served a copy upon the attorneys for the City of New Orleans:

It is ordered by the Court that the above styled and numbered cause be fixed for trial for the week beginning May 29, 1922.

New Orleans, May —, 1922.

Granted.

(Signed) O. O. P.,
Chief Justice.

Service accepted:
(Signed) MICHEL PROVOSTY,
Assistant City Attorney.

43 Endorsed on reverse: No. 25,294—Supreme Court of Louisiana—City of New Orleans et al. Vs. The Texas Transport & Terminal Co. Inc., Motion to Fix—Filed May 18, 1922,—(Signed) Paul E. Mortimer, Clerk.

(*Motion for Time to File Briefs.*)

No. 25294.

CITY OF NEW ORLEANS and RICHARD M. MURPHY, Plaintiff- and Appellees,

vs.

TEXAS TRANSPORT & TERMINAL COMPANY, Defendant and Appellant.

Motion for Additional Time to File Briefs.

On motion of Michel Provosty, Assistant City Attorney, and on suggesting to the Court that the time to file plaintiff's brief in the above numbered and entitled cause will expire on Wednesday, May 24th, 1922;

That plaintiff's brief is now in the hands of the printer and will be ready in the course of the next two or three days:

It is ordered by the Court that plaintiff be given until 27th day of May, 1922, to file its brief in this matter.

Granted.

(Signed) P. J. H.

Endorsed on reverse: No. 25,294—Supreme Court Louisiana—City of New Orleans et al.Vs. Texas Transport Co.—Motion of Appellees for Time to File Briefs—Filed May 23rd, 1922,—(Signed) Percy J. Heines, Dy. Clerk.

(*Cause Called, Argued & Submitted.*)

(Extract from Minutes.)

New Orleans, Monday, May 29th, 1922.

The Court (Division "B.") was duly opened, pursuant to adjournment.

44 Present: Their Honors Charles A. O'Niell, John R. Land and Joshua G. Baker, Associate Justices.

No. 25294.

CITY OF NEW ORLEANS et al.

vs.

TEXAS TRANSPORT & TERMINAL CO.

This cause was called and argued by counsel. Mr. George H. Terriberry opened the argument for the defendant and appellant. Mr. Ivy G. Kittredge, City Attorney, replied for the plaintiff and ap-

pellee, and Mr. Terriberry closed the argument. The Court then took the cause under advisement.

(*Final Judgment.*)

(Extract from Minutes.)

New Orleans, Monday, July 17th, 1922.

The Court (sitting En Banc) was duly opened pursuant to adjournment.

Present: Their Honors Olivier O. Provosty, Chief Justice. And Charles A. O'Niell, Ben C. Dawkins, Winston Overton, John R. Land, Joshua G. Baker, John St. Paul, Paul Leche and David N. Thompson, Associate Justices.

By Division "B."

No. 25294.

CITY OF NEW ORLEANS et al.

vs.

TEXAS TRANSPORT & TERMINAL CO., INC.

By O'NIELL, *J.*:

The judgment is affirmed, at appellant's cost.

45 *Opinion of the Court.*

UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

New Orleans, Monday, July 17th, 1922.

The Court was duly opened, pursuant to adjournment.

Present: Their Honors Charles A. O'Niell, John R. Land, Joshua G. Baker, Associate Justices.

His Honor, Mr. Justice O'Niell, pronounced the opinion and judgment in the following case:

46 Supreme Court of Louisiana, Division B, Composed of Justices O'Niell, Land, and Baker.

No. 25294.

CITY OF NEW ORLEANS

v.

TEXAS TRANSPORT & TERMINAL CO.

Appeal from the Civil District Court for the Parish of Orleans.

Percy Saint, Judge.

O'NIELL, *J.*:

Monday, Jul. 17, 1922.

The question propounded is whether a license tax, imposed by municipal ordinance, upon the business of steamship agents, is, in its application to the business of the defendant in this case, violative of the 2nd Clause of the 8th Section of the 10th Article of the Constitution of the United States, reserving to the Congress exclusive authority to regulate commerce with foreign nations and among the several states. The defendant company has appealed from a judgment declaring the tax valid.

The ordinance in question, No. 6608 of the Commission Council of New Orleans, is the general revenue law of the city. It levies a graded license tax upon every business, trade or occupation that is subject to taxation. The tax levied upon the business of steamship agents is graded according to the annual gross receipts of the business, and is $400 per annum when the year's receipts amount to $100,000 or more. The receipts of defendant's business exceeded $100,000, and defendant is therefore liable for the tax of $400, unless the business is interstate or foreign commerce.

The record does not show whether defendant is a domestic or foreign corporation; but that is a matter of no importance. The main office, or what is called the home office, of the company is in New York. The establishment in New Orleans, carrying on the business that is the subject of this litigation, is referred to in the testimony as a branch office. The company has a branch
47 office or establishment also at Galveston and at Port Arthur, Texas, at San Francisco, Cal., at Savannah, Ga., and at Baltimore, Md. Whether the business done in each city is that of a separate corporation is left in doubt. However, the only business that we are dealing with in this case is that which is done in New Orleans, by the local establishment.

The business is confined to dealings with ship owners, charterers and operators, whose vessels trade between New Orleans and foreign ports and between New Orleans and ports outside of Louisiana, in the United States. None of the ships from which the defendant company derives its business or patronage trades between New Or-

leans and another port in Louisiana, or between two ports in this state. In other words, all of defendant's patrons are ship owners, charterers or operators, engaged in either interstate or foreign commerce. Defendant represents four steamship lines regularly, under contract, for a commission fixed at a certain percentage of the gross amount of the freight charges collected by defendant for each steamship company. The four companies are the Compagnie Generale Transatlantique, carrying passengers and freight between New Orleans and Havre, Bordeaux, Antwerp, Hamburg and Bremen; the Holland-American Line, carrying passengers and freight between New Orleans and Rotterdam and Amsterdam; the Navigazione Generale Italiana, carrying freight between New Orleans and the Mediterranean ports; and the Toyo-Kisen-Kaisha, carrying freight between New Orleans and the Japanese and Chinese ports. Defendant also, occasionally, handles the business of tankers carrying fuel oil from New Orleans or from Baton Rouge, and of tramp ships taking cargo of sugar from New Orleans, all engaged in interstate or foreign commerce. In such cases, defendant's remuneration for the services rendered is not a commission, but, quoting the testimony of defendant's local manager, "the vessels are handled on a lump-sum basis—so much for handling the steamer." Defendant's local manager admitted, too, in his testimony, that his company was always ready and willing to accept employment from any ship owner, charterer or operator, engaged in interstate commerce, at the
48 port of New Orleans. All steamship traffic at this port is either interstate or foreign commerce.

Defendant does not own or charter or operate ships, or share in the profits or losses of any ship owner, charterer or operator. Nor does any ship owner, charterer or operator share in the profits or losses of defendant's business. The duties performed and services rendered by defendant—and by steamship agents generally—are: soliciting and engaging cargo for the ships, and nominating the ships for lifting the cargo; arranging for acceptance of delivery of cargo on the wharves; arranging with stevedores for discharging and loading cargo; issuing, in the name of the ship owner or charterer, bills of lading covering the cargo; arranging for bunkering and fitting the ships; collecting the freight charges due the ships; paying the ship's disbursements; attending to the immigration service, such as furnishing crew lists and obtaining identification cards for the seamen, and assisting the ship captains in all matters of local customs and regulations, with which, as a rule, ship captains are not familiar; and, finally, remitting to the ship owners or charterers the freight charges collected, less the ship's disbursements and the commissions due the steamship agent. The steamship agent has authority from his principal to quote freight rates, in soliciting cargo. He has authority also to buy fuel, oil or coal for bunkering a ship, and to contract for fitting a ship, when that is necessary, for any special or peculiar cargo. The steamshhip agent has authority also to issue receipts, in the name of his principal, for cargo delivered on the wharf. The steamship agent is therefore, in many respects,

the local representative of any ship owner or charterer who has engaged his services.

With regard to the employment of stevedores for discharging or loading cargo, the record in this case shows that the service is rendered by another corporation, styled J. P. Florio & Co., Inc., which is a subsidiary of the defendant company.

The business of steamship agents is an extensive business in New Orleans, as it is in every large seaport. As a separate
49 or an independent business, it is a result of the development of the country's commerce with foreign nations and among the several states. In the early days, when time was not so much the object or subject of economy as it is today, every ship's captain, for his own ship, discharged the duties and rendered the services for which local steamship agents are employed nowadays. But it would be impracticable now for a ship's captain to remain with his ship in port long enough to attend to the many matters which the local steamship agents can and do attend to for a ship at sea or in a foreign port. The business of steamship agents is therefore a necessary adjunct to commerce on the high seas.

We have stated the facts fully, perhaps more in detail than is necessary, in order to show every feature or characteristic of defendant's business, that might aid in determining whether it is subject to local taxation or is under Federal regulation. The Supreme Court of the United States admits that no formula has yet been devised, that is applicable to any or every case of this character, for determining whether a local tax is violative of the commerce clause of the Constitution. Osborne v. Mayor of Mobile, 83 U. S. (16 Wall), 482, 21 L. Ed. 472; Hump Hairpin Mfg. Co. v. Emmerson, 66 L. Ed. No. 12 Adv. Opinions, p. 343. The decisions of the august tribunal, however, boiled down and reduced to rules, have made it easy to recognize the important or distinguishing feature of any case.

The important and distinguishing feature of this case is that the business of the defendant company, however necessary as an adjunct to the interstate and foreign commerce of the steamship lines, is not a part of it. A tax on the business of the steamship agent does not increase the expense or reduce the profit of any steamship company's business. The tax is therefore not a direct hindrance or regulation of the interstate or foreign commerce of the steamship lines. If the steamship agent were employed at a salary, by a steamship company engaged in interstate or foreign commerce, a license tax imposed upon the local business of
50 the steamship agent would be a tax upon the business of his principal. If, under any other arrangement between the steamship agent and his patrons, the tax imposed upon the local business done by the steamship agent would be reflected in the expense account, and ultimately in the profit and loss account, of the interstate or foreign commerce of his patrons, the tax would be a direct hindrance to their interstate or foreign commerce. But the fact that the local business of the steamship agents in this port and the interstate and foreign commerce of the steamship lines are de-

pendent upon each other does not make a tax upon the local business of the steamship agents a tax upon the interstate or foreign commerce of the steamship lines. The reason is that, if the tax upon the local business of the steamship agents affects the interstate or foreign commerce of the steamship lines at all, it does so only remotely. A local tax may affect interstate or foreign commerce remotely or incidentally without infringing the Federal authority to regulate such commerce. The local license tax levied upon the business of ship chandlers, dealing only with steamships engaged in interstate or foreign commerce—and all of the ships that come to this port are engaged in either interstate or foreign commerce—is a remote and incidental burden upon their interstate and foreign commerce, in so far as it increases the price of ship chandlery. But the local tax upon the ship chandler's business is not, for that reason, such an interference with the interstate and foreign commerce of the steamship lines as is forbidden by the commerce clause in the Constitution.

In Leloup v. Port of Mobile, 127 U. S. 640, 32 L. Ed. 311, Mr. Justice Bradley, for the court, said:

"We may here repeat, what we have so often said before, that this exemption of interstate and foreign commerce from State regulation does not prevent the State from * * * regulating matters of local concern, which may incidentally affect commerce, such as wharfage, pilotage, and the like."

In Hopkins vs. United States, 171 U. S. 578, 43 L. Ed. 290, it was said:

"The business of buying and selling live stock at stock yards in a city, by members of a stock exchange, as commission merchants, is not interstate commerce, although most of the purchases and
51 sales are of live stock sent from other states, and the members of the stock exchange are employed to sell, by letter from the owners of the stock in other states, and send agents to other states to solicit business, and advance money to the cattle owners, and pay their drafts, and aid them in making the cattle fit for market."

In Coe v. Town of Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. Rep. 475, it was said:

"Products of a State, although intended for exportation to another State and partially prepared for that purpose by being deposited at a place or port of shipment within the State, are liable to be taxed like other property within the State.

"Exportation is not begun until goods are committed to the common carrier for transportation out of the state to the State of their destination or until they have started on their ultimate passage to that State. Until that time they are taxable as a part of the general mass of property in the State, although they are not taxable as exports.

"The carrying of property in cars or vihicles, or floating it, to the depot, where the journey is to commence, is no part of the exportation."

In New York ex rel. Pennsylvania Railroad Co. v. Knight, 192 U. S. 21, 48 L. Ed. 325, it was said:

"A franchise tax imposed under appropriate statutes of the State of New York upon the Pennsylvania Railroad Company for carrying on a cab service wholly within the state, for the purpose of carrying its passengers to and from the ferry landing in New York City, the charges for which are entirely separate from those for other transportation, is not an unconstitutional burden on interstate commerce, but is a tax upon an independent local service, preliminary or subsequent to any interstate transportation."

In the course of his opinion, in the case last quoted, Mr. Justice Brewer, for the court, after quoting from Coe v. Town of Errol, gave this apt illustration:

"As shown in the opinion from which we have just quoted, many things have more or less close relation to interstate commerce which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?"

The city attorney, in this case, cites, as appropriate, the decision in Ficklen v. Shelby County Taxing District, 145 U. S. 1, 36 L. Ed. 601. If the basis of that decision was that the license tax was not reflected in the expense accounts of the non-resident merchants who actually sold the goods and shipped them from other states
52 into Tennessee, the decision is appropriate to this case. The local license tax which was declared valid in that case, levied upon brokers, buyers or sellers, on commission or otherwise, was a flat fee of $50 per annum, plus 10 cents on every $100 of capital invested in the business; provided that, if no capital was invested, the additional tax was 2¼ per cent on the gross annual commissions, charges or compensations of the business. The licensee was required to give bond to report the amount of his commissions, charges and compensations at the end of the year, and to pay the 2¼ per cent then. In January, 1887, each of the licensees, C. L. Ficklen, and Cooper & Co., having no capital invested, paid the fee of $50, took out the license, and gave bond to report the amount of their commissions, charges and compensations, and to pay the 2¼ per cent thereon, at the end of the year. At the beginning of the year 1886, each licensee tendered $50 and demanded a license for that year, but declined to report the commissions, charges or compensations for the year 1867, or to pay the 2¼ per cent thereon. The

county trustee refused to issue the license unless Ficklen and Cooper & Co. would each report the amount of commissions, charges and compensations for the year 1887 and pay the 2¼ per cent thereon. Ficklen and Cooper & Co. proceeded by injunction to prevent the collection of the 2¼ per cent, and were successful in the Supreme Court of the United States. The business of each licensee was said to be that of a merchandise broker. Each rented a room, in Shelby County, where he kept and exhibited his samples and solicited business and negotiated sales for merchants residing in other states. The brokers did not sell goods, but took orders and sent them to the non-resident merchants, who shipped the goods direct to the purchasers. The record does not show that either of the agents or brokers was paid a salary by a non-resident merchant; and we assume that the brokers' profits consisted of commissions paid by the non-resident merchants on the sales which the agents or brokers negotiated with local buyers. The opinion in the case, by Chief Justice Fuller, maintains that the license tax based upon the amount of profits thus earned by the local business of the brokers was
53 not a tax on interstate commerce, notwithstanding the sales for which the commissions were paid were made in interstate commerce. The force of the ruling on that subject, however, was impaired to some extent by a suggestion in the opinion that the brokers' license to do business was not limited to transactions with non-resident merchants, and by a further suggestions that the brokers were obligated by their bonds to report their profits and to pay the 2¼ per cent thereon.

Appellant cites and relies upon the ruling in McCall v. People of the State of California, 136 U. S. 104, 34 L. Ed. 469. In that case, the local license tax that was declared invalid was "For every railroad agency, twenty-five dollars per quarter." McCall, who refused to pay the tax, was an agent, in San Francisco, for the New York, Lake Erie & Western Railroad Company, having its principal place of business in Chicago and operating a continuous line of railroad thence to New York. McCall's only duty was to solicit passenger traffic for the road he represented; that is, to induce persons contemplating a trip east to be booked over the New York, Lake Erie & Western Railroad. He did not sell tickets, or make any collections or disbursements for the road, but merely went with the passengers to the Central Pacific Railroad Offices, where the tickets were sold to them. The case as reported does not show how the agent was paid for his services; but the theory of the decision is that he was paid a salary by the railroad company. Whether he was paid a salary or a commission is not so important, in as much as the decision of the case turned upon the conclusion of fact that the tax would have been an expense of the railroad company itself if the agent had paid it. The decision therefore cannot be regarded as maintaining that a license tax imposed upon an independent local business is violative of the commerce clause of the Constitution if the tax only remotely or incidentally affects interstate commerce.

The attorneys for appellant have directed our attention to the fact that the decision in McCall v. People of the State of California has

been cited with approval at least seventeen times; that is, in
54 the following cases: Norfolk & Western Railroad Co. v. Commonwealth of Pennsylvania, 136 U. S. 114, 34 L. Ed. 394; Crutcher v. Commonwealth of Kentucky, 141 U. S. 47, 35 L. Ed. 649; Pacific Express Co. v. Seibert, 142 U. S. 339, 35 L. Ed. 1035; Ficklen v. Shelby County Taxing District, 145 U. S. 1, 36 L. Ed. 601; Brennen v. City of Titusville, 153 U. S. 289, 38 L. Ed. 719; Hooper v. State of California, 156 U. S. 648, 39 L. Ed. 297; Hopkins v. United States, 171 U. S. 578, 43 L. Ed. 290; Williams v. Fears, Sheriff, 179 U. S. 270, 45 L. Ed. 180; Stockard v. Morgan, 185 U. S. 27, 46 L. Ed. 785; Atlantic & Pacific Telegraph Co. v. City of Philadelphia, 190 U. S. 160, 47 L. Ed. 995; Norfolk & Western Railway Co. v. Sims, 191 U. S. 441, 48 L. Ed. 254; Western Union Telegraph Co. v. State of Kansas ex rel. Coleman, 216 U. S. 1, 54 L. Ed. 355; International Text Book Co. v. Pigg, 217 U. S. 91, 54 L. Ed. 678; United States Fidelity & Guaranty Co. v. Commonwealth of Kentucky, 231 U. S. 394, 58 L. Ed. 283; City of Sault Ste. Marie v. International Transit Co., 234 U. S. 333, 58 L. Ed. 1337; Kansas City, Fort Scott & Memphis Railway Co. v. Botkin, 240 U. S. 227, 60 L. Ed. 617; Cheney Brothers Co. v. Commonwealth of Massachusetts, 246 U. S. 147, 62 L. Ed. 632.

Our reading of the opinions in the cases cited has confirmed our interpretation of the ruling in McCall v. People of the State of California, and has convinced us that the decision is not against the established doctrines that a state or municipal tax on a local business may effect interstate or foreign commerce remotely or incidentally without infringing the commerce clause of the Constitution. In fact the decision was only an affirmance of the doctrine of the drummers' cases, viz: Robbins v. Taxing District of Shelby County, 120 U. S. 489, 30 L. Ed. 694; Asher v. State of Texas, 128 U. S. 129, 32 L. Ed. 368; and Stoutenburgh v. Hennick, 129 U. S. 141, 32 L. Ed. 637.

Norfolk & Western Railroad Co. v. Commonwealth of Pennsylvania is authority for the doctrine that a state cannot, under the guise of a license tax, interfere with the right of a foreign corporation, engaged in interstate commerce, to do business in the state. The license tax declared invalid in that case was imposed directly
55 upon the interstate commerce, as appears from one of the headnotes of the opinion, viz:

"A license tax assessed under the Pennsylvania act of June 7, 1879 (P. L. 112, 120), by the Auditor General of that State, against such company [meaning an interest to railroad domiciled in Virginia] for keeping an office in Philadelphia for the use of its offices, stockholders, agents and employees, is a tax upon the company's business of interstate commerce, and is a violation of the commercial clause of the Constitution of the United States."

In Crutcher v. Commonwealth of Kentucky, the decision in McCall v. People of the State of California was cited in the same list—and as being in the same category—with the three drummers' cases, Robbins v. Taxing District, Asher v. Texas, and Stoutenburgh v.

Hennick, and merely in support of the doctrine that a state law is unconstitutional that requires a foreign corporation engaged in interstate commerce to take out a license to do business in the state, "no matter how specious the pretext may be for imposing it." In Crutcher's case, the state license tax was demanded of him for doing business in Kentucky, as the agent for the United States Express Company, an interstate carrier, domiciled in another state.

In Pacific Express Co. v. Seibert, the decision in McCall v. People of the State of California was cited in a list of cases maintaining the established doctrine that a state cannot lay a tax upon interstate commerce in any form, whether upon the transportation, or upon the receipts derived therefrom, or upon the occupation or business of carrying it on. The license tax in that case, however, was declared valid, because it was levied only upon the intrastate business of the corporation, viz:

"A tax upon the business of an express company done within the State is not a tax upon interstate commerce, although the company is also engaged in business between the States."

In Ficklen v. Taxing District of Shelby County, it was said that, in McCall v. People of the State of California, McCall was the agent, soliciting passenger traffic, for "the interstate railroad which he represented." There is not the slightest intimation that McCall's agency was an independent, local business.

Brennan v. City of Titusville was another drummer's case. Brennan was a traveling salesman, going from house to house, in Titusville, Pennsylvania, exhibiting samples and taking orders for
56 portraits and picture frames, for a manufacturer domiciled in Chicago, Illinois, who filled the orders by shipping the portraits and frames direct from Chicago into Pennsylvania and other States. The City of Titusville demanded a license tax of Brennan for the business he was doing; and the Supreme Court of the United States declared the tax invalid, citing the three other drummer cases, viz: Robbins v. Taxing District, Asher v. Texas, and Stoutenburgh v. Hennick, and declaring that Ficklen v. Taxing District was not a departure, or was not intended as a departure, from the doctrine of the drummers' cases. From which we infer that Ficklen's business, unlike the drummers' occupation, was an independent brokerage business, separate and apart from the business of the merchants who sold the goods in interstate trade. McCall's case was referred to as an illustration of a direct tax on interstate commerce; and, quoting from the opinion of Mr. Justice Lamar in that case, Mr. Justice Brewer, for the court said: "The test is, was this business a part of the commerce of the road?" In other words, it was said that the court had found, as a fact, that McCall's agency was a part of the interstate commerce of the road. From which it may well be inferred that McCall was a salaried employee of the railroad company.

Hooper v. State of California is authority for the doctrine merely that the business of writing marine insurance is not "commerce", in the meaning of the commerce clause of the Constitution. The

McCall case was cited, with many other cases, as illustrating the doctrine that the right of a corporation engaged in interstate commerce to do business in any and every state is an exception to the general rule that the right of a foreign corporation to engage in business in a state other than that of its creation depends upon the will of such other state.

Hopkins v. United States is the stockyards case, to which we have already referred. In that case, the reference to McCall v. California indicates that McCall was a salaried employee of the interstate railroad company. The court distinguished McCall's case from the stockyards case, thus:

57 "McCall v. California, 136 U. S. 104 (34:391, 3 Inters. Com. Rep. 181) is cited for the proposition that the solicitors employed by these defendants are engaged in interstate commerce. In that case, the railroad company itself was engaged in such commerce and its agent in California was taxed by reason of his business in soliciting for his company that which was interstate commerce. The fact that he did not sell tickets or receive or pay out money on account of it was not regarded as material. His principal was a common carrier, engaged in interstate commerce, and he was engaged in that commerce because he was soliciting for the transportation of passengers by that company through the different states in which the railroad ran from the State of California. [N. B. It was a mistake to say, "from the State of California," because the railroad ran from New York to Chicago]. In the case before us the defendants are not employed in interstate commerce, but are simply engaged in the performance of duties or services relating to live stock, upon its arrival at Kansas City. We do not think it can be properly said that the agents of the defendants, whom they send out to solicit the various owners of stock to consign the cattle to one of the defendants for sale, are thereby themselves engaged in interstate commerce. They are simply soliciting the various stock owners to consign the stock owned by them to particular defendants at Kansas City, and, until the arrival of the stock at that point and the delivery by the transportation company, no duties of an interstate commerce nature arise to be performed by the defendants. As the business they do is not interstate commerce, the business of their agents in soliciting others to give them such business is not itself interstate commerce."

As we have already pointed out, the business of the members of the live-stock exchange in its relation to the interstate business of the live-stock owners, was very similar to the business of steamship agents, in its relation to the interstate and foreign transportation of the steamship companies. We do not observe any distinction between the two cases, in the relation of the business that is here taxed, to the interstate and foreign commerce that it facilitates.

Williams v. Fears, Sheriff, is authority for the doctrine merely that the business of an emigrant agent, engaged in hiring laborers to work outside of the state, is not interstate commerce. Referring to the case of McCall v. People of the State of California, Chief Justice Fuller said:

58 "But there the business was directly connected with interstate commerce, and consisted wholly in carrying it on. The agent was the agent of the transportation company, and he was acting solely in its interest."

Stockard v. Morgan was another "merchandise broker" case very similar to the drummers' cases. The broker, having a sample room in Chattanooga, Tennessee, solicited and accepted orders locally for goods to be shipped into Tennessee by non-resident merchants whom the broker represented, and from whom the broker received a commission on the sales he negotiated. The court distinguished the case of Robbins v. Taxing District from that of Ficklen v. Taxing District, and held that the case then under consideration was within the doctrine of the Robbins case, and that the Broker's business was not subject to state or local taxation. The McCall case was cited, in a long list containing, and as being in the same category with, the drummers' cases, Asher v. Texas and Stoutenburgh v. Hennick. The ruling in the Ficklen case was cited and vindicated by the statement that Ficklen had taken out an unrestricted license to do either intrastate or interstate business, and that it had only so happened that his business was all interstate business in the year for which his business was taxed.

Atlantic & Pacific Telegraph Co. v. City of Philadelphia is authority for the doctrine that a telegraph company, although engaged in interstate commerce, is subject to a reasonable municipal tax for the enforcement of the local government's supervision over the company's poles and wires. The tax in that case was justified as a reasonable police regulation. The McCall case was cited, in a long list of cases including the drummer cases, Robbins v. Taxing District, Asher v. Texas, and Stoutenburgh v. Hennick, as authority for the general proposition that the Federal authority to regulate interstate or foreign commerce is necessarily exclusive whenever the subject of such regulation is national in its character or admits of only one uniform system or plan of regulation. Surely, the business of steamship agents, as described in this record, is not of such national character as to require a uniform system of taxation throughout the country. In that respect, it is as much a matter of local concern as is "wharfage, pilotage, and the like;" as to which,

59 the court said, in Leloup v. Port of Mobile, 127 U. S. 640, 32 L. Ed. 311. "This exemption of interstate and foreign commerce from State regulation does not prevent the State from * * * regulating matters of local concern, which may incidentally affect commerce, such as wharfage, pilotage, and the like."

In Norfolk & Western Railway Co. v. Sims, Sheriff, the sheriff of Person County, North Carolina, undertook to collect a license tax of $350 from Sears, Roebuck & Co., domiciled in Chicago, for shipping a sewing machine, c. o. d. from Chicago, to Mrs. Satterfield, in Person County, North Carolina. She had sent an ordinary mail order for the machine. The state court held that Sears, Roebuck & Co. should pay the tax; but the Supreme Court of the United States reversed the judgment. The only reference to McCall v. California

was the statement that, in that case, "a license tax imposed upon the agent of a railroad between Chicago and New York, soliciting business in San Francisco, was held to be void."

In Western Union Telegraph Co. v. Kansas ex rel. Coleman the ruling was that the State of Kansas could not exact of the telegraph company, which was a foreign corporation engaged in interstate commerce, a "charter fee" of a stated percentage of its entire authorized capital stock, as a condition of the company's right to continue doing business in the State of Kansas. The only reference made to the McCall case was a recital of the facts and the ruling in the case; which we have repeated, in substance, several times. There was no intimation that McCall's business had been a separate business, distinct from the business of the railroad company that he had represented.

International Text-book Co. v. Pigg is authority for the proposition that the business of conducting a correspondence school, sending courses of instruction with text-books, illustrations, etc., through the mail, from one state into other states, is interstate commerce within the meaning of the commerce clause of the Constitution. In the course of the opinion rendered in the case, the court quoted at great length from Crutcher v. Kentucky, and then cited McCall v. People of the State of California, in a long list of cases including the drummers' cases, as being "to the same effect" as was the ruling in Crutcher's case.

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In United States Fidelity & Guaranty Co. v. Kentucky, the business of publishing and furnishing to subscribers in several states a list of guaranteed attorneys at law was held not to be interstate commerce, notwithstanding some of the inquiries received and answered by the guaranteed attorneys, from subscribing merchants, were in contemplation of interstate commercial transactions. Referring to the doctrine of the McCall case, the court said that it "was clearly within the reasoning and authority of Robbins v. Taxing District, and other cases of that class."

In City of Sault Ste. Marie v. International Tran-it Co., the ruling was that the city could not require the Transit Company, a Canadian corporation, engaged in operating a ferry across the St. Mary's River, between the City of Sault Ste. Marie, in Michigan, and the province of Ontario, in Canada, to pay a license tax as a condition of the company's right to receive and land passengers and freight at the company's wharf in Sault Ste. Marie. The McCall case was cited, in a long list of cases including the drummer cases, as maintaining "the fundamental principle involved."

In Kansas City, Fort Scott & Memphis Railway Co. v. Botkin, the ruling was that an annual tax graduated according to the paid-up capital stock of the corporation, imposed upon every domestic corporation for the privilege of being a corporation, was not a tax on the property of the railway company outside of the state, because the tax was not a property tax. The McCall case, with many other cases, was cited merely for the broad statement that interstate commerce is not subject to local taxation "in any form."

In Cheney Brothers Co. v. Commonwealth of Massachusetts, the

company was a Connecticut corporation, manufacturing and selling silk fabrics. The company maintained a selling office in Boston, where the company's salesmen solicited orders and sent them to the Connecticut factory, whence the goods were shipped direct to the buyers in Massachusetts. An important statement of the facts of the case was: "The salesmen and the rent are paid directly from Connecticut," etc. The business conducted by the salesmen in Boston, therefore, was not an independent or a local business. The
61 court cited the McCall case, with other cases like it, in support of the court's ruling that the excise tax imposed by the State of Massachusetts upon the Connecticut corporation was not valid.

Our purpose in reviewing the seventeen cases in which the McCall case was cited was to see how the Supreme Court of the United States had harmonized the decision in that case with the decision in the case of Ficklen v. Taxing District. The apparent conflict in the rulings has arisen from the fact that the report of the decision does not, in either case, show how the local agent or representative, of the non-resident engaged in interstate commerce, was paid for the services he rendered, or what was the immediate source of revenue from his business. Our conclusion is that McCall was regarded as a hired agent or representative of the corporation engaged in interstate commerce, and not as the proprietor of an independent or a separate, local business; and that Ficklen was regarded, not as a hired agent or representative of the non-resident merchants for whom he solicited business, but as the proprietor of an independent or separate, local business. Neither of the decisions has ever been overruled. Both have been cited often with approval. Therefore, they must be reconcilable by a difference in the court's conclusion on the controlling question of fact in each case. That question was in each case, whether the local business that was taxed was an independent business or was a part of the interstate commerce of the patron or patrons of the local business.

Having read all of the decisions that have been cited as pertinent, we have concluded that defendant's business, being local, and not a part of the interstate or foreign commerce of defendant's patrons, is subject to the license tax complained of. That is because the tax imposed upon the local business of the steamship agent is not an immediate burden upon the interstate or foreign commerce of the steamship lines, but affects it only incidentally and remotely, if at all.

The judgment is affirmed, at appellant's cost.

[Endorsed:] 25294. City of N. O.

62 (*Petition for Rehearing.*)

Supreme Court of Louisiana.

No. 25294.

CITY OF NEW ORLEANS

vs.

THE TEXAS TRANSPORT & TERMINAL CO., INC.

Petition for Rehearing.

To the Honorable the Supreme Court of the State of Louisiana:

The petition of The Texas Transport & Terminal Co. Inc., appellant in the above cause, with respect, shows:

That in the opinion and decree rendered in this cause on the 17th day of July, 1922, there is error to the prejudice of petitioner and appellant, and that a rehearing should be granted herein for the following reasons:

1. The Court erred in holding that the business in which petitioner and appellant is engaged is a local business, separate and distinct from the business of interstate and foreign commerce in which its principals are engaged.

2. The Court erred in holding that petitioner and appellant is not engaged in interstate and foreign commerce.

3. The Court erred in holding that the Ordinance No. 6608 of the Commission Council of the City of New Orleans does not, in so far as it requires of petitioner the payment of a license to carry on the business in which it is engaged, contravenes clause 3 (known as the Commerce Clause) of section 8 of article 1 of the Constitution of the United States.

4. The Court erred in affirming the judgment of the Civil District Court for the Parish of Orleans, State of Louisiana, holding petitioner and appellant liable to the City of New Orleans for a license to engage in the business of interstate and foreign commerce.

63 For the foregoing and other errors manifest in said opinion and decree, petitioner prays that said decree be vacated and set aside and that a rehearing be granted herein.

And for all general relief.

THE TEXAS TRANSPORT & TERMINAL CO., INC.,

(Sgd.) By TERRIBERRY, RICE & YOUNG,

Attorneys.

July 25, 1922.

I certify that a copy of this petition was this day served by me on Ivy G. Kittredge, Esq., City Attorney, for the City of New Orleans.

(Signed) GEO. H. TERRIBERRY.

Endorsed on reverse: No. 25,294—Supreme Court of Louisiana—City of New Orleans vs. The Texas Transport & Terminal Co. Inc.,—Petition for Rehearing—Filed July 25, 1922,—(Signed) Percy J. Heines, Dy. Clerk.

(*Rehearing Refused.*)

(Extract from Minutes.)

New Orleans, Thursday, October 19th, 1922.

The Court was duly opened, pursuant to adjournment.

Present: Their Honors Olivier O. Provosty, Chief Justice. And Ben C. Dawkins, John R. Land and John St. Paul, Associate Justices.

Absent: Charles A. O'Niell, Winston Overton and Joshua G. Baker, Associate Justices.

No. 25294.

CITY OF NEW ORLEANS et al.

vs.

TEXAS TRANSPORT & TERMINAL CO., INC.

By THE WHOLE COURT:

It is ordered that the rehearing applied for in this case be refused.

64 UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana, do hereby certify the foregoing sixty-three (63) pages to be a true and correct copy of all the proceedings had in the Civil District Court, for the Parish of Orleans, in a certain suit wherein City of New Orleans, et al., were plaintiffs, and the Texas Transport & Terminal Company, Inc., was defendant, bearing the No. 141,225 of the docket of the said court; and, also a true and correct copy of all the proceedings had in this, the Supreme Court of Louisiana, on the appeal taken by the said defendant, which record is now on the files of the said Supreme Court of Louisiana, under the No. 25,294.

In testimony whereof, I hereunto sign my name and affix the seal of the Court aforesaid, at the city of New Orleans, this the 26th day

of October, Anno Domini, one thousand, nine hundred and twenty-two.

[Seal of the Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Clerk Supreme Court of Louisiana.

65 UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Oliver O. Provosty, Chief Justice of the Supreme Court of the State of Louisiana, do hereby certify that Paul E. Mortimer is Clerk of the Supreme Court of Louisiana; that the signature of Paul E. Mortimer to the foregoing certificate is in the proper handwriting of him, the said clerk, that said certificate is in due form of law; and that full faith and credit are due to all of his official acts as such.

In witness whereof, I hereunto sign my name and affix the seal of the Court aforesaid, at the city of New Orleans, this the 26th day of October, Anno Domini, one thousand, nine hundred and twenty-two.

[Seal of Supreme Court of the State of Louisiana.]

OLIVIER O. PROVOSTY,
Chief Justice Supreme Court of Louisiana.

66 UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana, do hereby certify that the Supreme Court of Louisiana is the highest Court of law in said state; that the Honorable Olivier O. Provosty is the Chief Justice of the said court, and that his signature to the foregoing certificate is genuine.

In witness whereof, I hereunto sign my name and affix the seal of the Court aforesaid, at the city of New Orleans, this the 26th day of October, Anno Domini, one thousand, nine hundred and twenty-two.

[Seal of Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Clerk Supreme Court of Louisiana.

67 *Original Petition for Writ of Error and Assignment of Errors.*

Supreme Court of Louisiana.

No. 25294.

CITY OF NEW ORLEANS
versus
THE TEXAS TRANSPORT & TERMINAL CO., INC.

Petition for Writ of Error, Assignment, and Prayer.

Considering itself aggrieved by the final decision of the Supreme Court of Louisiana in rendering judgment against it in the above entitled cause, the defendant and appellant, The Texas Transport & Terminal Co., Inc., prays for a writ of error, from the said decision and judgment, to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

And the said The Texas Transport & Terminal Co., Inc., assigns the following errors in the records and proceedings of the said cause:

1. The Supreme Court of Louisiana erred in holding that the business in which petitioner is engaged is a local business, separate and distinct from the business of interstate and foreign commerce in which its principals are engaged.

2. The Supreme Court of Louisiana erred in holding that petitioner and appellant is not engaged in interstate and foreign commerce.

3. The Supreme Court of Louisiana erred in holding that the Ordinance No. 6608 of the Commission Council of the City of New Orleans does not, in so far as it requires of petitioner and appel-
68 lant the payment of a license to carry on the business in which it is engaged, contravene clause 3 (known as the Commerce Clause) of section 8 of article 1 of the Constitution of the United States.

4. The Supreme Court of Louisiana erred in affirming the judgment of the Civil District Court for the Parish of Orleans, State of Louisiana, holding petitioner and appellant liable to the City of New Orleans for a license to engage in the business of interstate and foreign commerce.

For which errors the petitioner, The Texas Transport & Terminal Co., Inc., prays that the said judgment of the Supreme Court of the State of Louisiana, dated October 19, 1922, be reversed and a judgment rendered in favor of petitioner, The Texas Transport & Terminal Co., Inc., and for costs.

TERRIBERRY, RICE & YOUNG,
Attorneys for The Texas Transport & Terminal Co., Inc., Defendant and Petitioner.

69 *Order Granting Writ of Error.*

STATE OF LOUISIANA, *ss:*

Supreme Court.

Let the writ of error issue upon the execution of a bond by The Texas Transport & Terminal Co., Inc., to the City of New Orleans, in the sum of Two Thousand Dollars; such bond, when approved, to act as a supersedeas.

Dated October 25th, 1922.

[Seal of Supreme Court of the State of Louisiana.]

OLIVIER O. PROVOSTY,
Chief Justice Supreme Court of Louisiana.

[Endorsed:] No. 25294. Supreme Court Louisiana. City of New Orleans et al. vs. The Texas Transport & Terminal Co., Inc. Petition for writ of errors, assignment of errors & order for writ of error. Filed Oct. 24, 1922. Paul E. Mortimer, Clerk.

70 *Bond for Writ of Error.*

CITY OF NEW ORLEANS

versus

THE TRANSPORT & TERMINAL CO., INC.

Bond.

Know all men by these presents, That we, The Texas Transport & Terminal Co., Inc., as principal, and Union Indemnity Company, as surety, are held and firmly bound unto the City of New Orleans, Louisiana, in the sum of Two Thousand Dollars, to be paid to the said City, to which payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 24th day of October, 1922.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Louisiana.

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

THE TEXAS TRANSPORT & TERMINAL CO., INC.,

(Signed) By W. H. HENDREN,
Its Local Manager.

UNION INDEMNITY COMPANY,

(Signed) By FRAZER L. RICE, *Attorney in Fact.*

Bond approved, and to operate as a supersedeas.
Dated October 25th, 1922.

(Signed) OLIVIER O. PROVOSTY,
[SEAL.] *Chief Justice, Supreme Court of Louisiana.*

71 Endorsed on the reverse: No. 25,294—Supreme Court of Louisiana—City of New Orleans, et al. Vs. The Texas Transport & Terminal Co. Inc.—Bond for Writ of Error—Filed Oct. 24, 1922,—(Signed) Paul E. Mortimer, Clerk.

72 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Louisina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the City of New Orleans and The Texas Transport & Terminal Co., Inc., wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of the clause of the Constitution, or of a
73 treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The Texas Transport & Terminal Co., Inc. as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, the 25th day of October, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal of U. S. District Court for the Eastern Dist. of La., N. O. Div.]

H. J. CARTY,
Clerk of the District Court of the United States for the Eastern District of Louisiana.

Allowed by

[Seal of Supreme Court of the State of Louisiana.]

OLIVIER O. PROVOSTY,
Chief Justice Supreme Court of Louisiana.

[Endorsed:] No. 25,294. The Taxas Transport and Terminal Co. Inc., Plaintiff-in-error, vs. City of New Orleans, Defendant-in-error. Writ of Error. Filed Oct. 25, 1922. Percy J. Heines, Dep. Clerk.

74 *Certificate of Lodgment.*

UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana, do hereby certify that, there was lodged with me, as such clerk, on October 24th, 1922, in the matter of The Taxas Transport & Terminal Company, Inc., Plaintiff-in-error Vs. City of New Orleans, et al., Defendants in error:

1st. The original petition for writ of error, as herein set forth.

2nd. The original assignment of errors, as herein set forth.

3rd. The Bond for writ of error, a copy of which is herein set forth.

4th. The original writ of error, as herein set forth.

5th. Two copies of the writ of error; one copy for the defendants-in-error, and one copy to be lodged in my office.

In witness whereof, I hereunto sign my name and affix the seal of the Court aforesaid, at the city of New Orleans, this the 26th day of October, Anno Domini, one thousand, nine hundred and twenty-two.

[Seal of Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Clerk Supreme Court Louisiana.

75 *Citation to City of New Orleans and Acceptance of Service Thereof (Original).*

THE TEXAS TRANSPORT & TERMINAL CO., INC., Plaintiff-in-error,
versus
CITY OF NEW ORLEANS, Defendant-in-error.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of New Orleans, Louisiana, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Louisiana, wherein The Texas Transport & Terminal Co., Inc. is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Louisiana, this 25th day of October, 1922.

OLIVIER O. PROVOSTY,
Chief Justice Supreme Court of Louisiana.

New Orleans, Louisiana, October 24th, 1922.

I, the attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

IVY G. KITTREDGE,
City Attorney for the City of New Orleans, Louisiana.

[Endorsed:] No. 25294. Supreme Court Louisiana. The Texas Transport & Terminal Co., Plft.-in-error vs. City of New Orleans et al., Defendant-in-error. Citation to City of New Orleans and Acceptance of service. Oct. 24, 1922. Paul E. Mortimer, Clerk.

76 *Return to Writ.*

UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified

transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto sign my name, and affix the seal of the Court aforesaid, at the city of New Orleans, this the 26th day of October, Anno Domini, one thousand, nine hundred and twenty-two.

[Seal of the Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Clerk Supreme Court of Louisiana.

77 In the Supreme Court of the United States, October Term, 1922.

No. 672.

THE TEXAS TRANSPORT & TERMINAL CO., INC., Plaintiff in Error,

vs.

CITY OF NEW ORLEANS, Defendant in Error.

Stipulation and Admission.

It is stipulated and admitted by The Texas Transport & Terminal Co., Inc., plaintiff in error, through its undersigned attorney, and City of New Orleans, defendant in error, and Richard M. Murphy, Commissioner of the Department of Finance of the City of New Orleans, joint plaintiff with the City of New Orleans in the suit below, through their undersigned attorney, that:

Richard M. Murphy, Commissioner of the Department of Finance of the City of New Orleans, was never and is not now a necessary party to this suit and this writ and that he has, neither individually nor officially, any interest therein separate or distinct from that of the City of New Orleans, and that the defendant in error, the City of New Orleans includes and embraces the said Richard M. Murphy, Commissioner of the Department of Finance of the City of New Orleans.

THE TEXAS TRANSPORT & TERMINAL CO., INC.,
By GEO. H. TERRIBERRY,
Attorney.
CITY OF NEW ORLEANS AND
RICHARD M. MURPHY,
Commissioner of Finance of the City of New Orleans,
By IVY G. KITTREDGE,
City Attorney of New Orleans.

Nov. 16, 1922.

78 [Endorsed:] 672—29222. In the Supreme Court of the United States. No. 672. October Term, 1922. The Texas Transport & Terminal Co., Inc., Plaintiff in Error, vs. City of New Orleans, Defendant in Error. Stipulation and Admission.

79 [Endorsed:] File No. 29,222. Supreme Court U. S., October Term, 1922. Term No. 672. The Texas Transport & Terminal Co., Inc., Plff. in Error, vs. The City of New Orleans. Stipulation and addition to record. Filed Nov. 20, 1922.

Endorsed on cover: File No. 29,222. Louisiana Supreme Court. Term No. 672. The Texas Transport & Terminal Company, Incorporated, plaintiff in error, vs. The City of New Orleans. Filed October 30, 1922. File No. 29,222.

MAR 19 1923
WM. R. STANSBU
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Supreme Court of the United States

OCTOBER TERM, 1922.

No. [redacted] 141

THE TEXAS TRANSPORT & TERMINAL COMPANY, INCORPORATED,

Plaintiff in Error,

versus

THE CITY OF NEW ORLEANS,

Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

GEORGE H. TERRIBERRY,
W. W. YOUNG,
JOSEPH M. RAULT,
Attorneys for The Texas Transport & Terminal Company, Incorporated, Plaintiff in Error.

Hauser Ptg. Co., "The Legal Printers," 720 Poydras St., New Orleans.

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Supreme Court of the United States

OCTOBER TERM, 1922.

No. 672.

THE TEXAS TRANSPORT & TERMINAL COMPANY, INCORPORATED,

Plaintiff in Error,

versus

THE CITY OF NEW ORLEANS,

Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

PLEADINGS.

This case comes on writ of error to the Supreme Court of Louisiana.

The City of New Orleans brought suit in the Civil District Court for the Parish of Orleans, Louisiana, against The Texas Transport & Terminal Company, Inc., demanding of the defendant a license in the sum of four hundred dollars, for engaging in the business of steamship agent in the year 1922. It was alleged that the gross receipts from the operation of the steamship agency business of the defendant were more than the sum of one hundred thousand dollars for the year 1921; that all persons conducting any business, without a license from the City after the first day of March of any year, were delinquent; that the defendant had not paid the City the license for carrying on its business for 1922, and that, under the terms of a City ordinance, the license for 1922 was due for carrying on said business, and that the City had a first lien on the property of the defendant for the security of the license claimed; and that the books of the defendant should be produced in Court for inspection. An order was issued for a rule on the defendant to produce its books at a stated date and to show cause why it should not be condemned to pay to the City four hundred dollars as a license tax for the year 1922, together with two per cent per month interest thereon from March 1, 1922, until paid, and a commission of ten per cent upon the aggregate amount of license and penalties, with first lien and privilege upon all the property of the defendant, and why the defendant should not be enjoined from conducting its business until the amounts were paid, and why the rule should not be made absolute, and judgment rendered in favor of the City for the amount demanded, with penalties, interest, commission and costs of Court, with first lien and privilege upon the pro-

perty of defendant, and the injunction perpetuated. (Record, pages 1 and 2).

The defendant made a return, admitting that it was engaged in the business of steamship agent in the City of New Orleans in 1922; that its gross receipts from said business for the year 1921 were more than one hundred thousand dollars; that it had not paid to the City any license for conducting its business in 1922.

It denied that it owed the City the license demanded.

Affirmatively, as a defense, the defendant alleged that its business of steamship agent was exclusively confined to the representation of ship owners, charterers and operators, whose vessels trade between New Orleans, a port within the State of Louisiana, and European ports, and also between New Orleans and ports within States other than Louisiana; that, in other words, it confined its business exclusively to the representation of principals engaged in the transportation of passengers and freight, by water, in interstate or foreign commerce; that its duties were to enter the ships at the customhouse; to solicit and engage cargo for the ships; to nominate the ships for lifting the cargo; to arrange for the acceptance of delivery of cargo on the wharves; to arrange with the stevedores for loading the outward and discharging the inward cargo; to issue, in the names of its principals, bills of lading covering the cargo; to collect freight due the ships; to pay the ships' disbursements; to clear the ships at the Customhouse, and to remit to its principals the freight collected, less the disbursements for the ships and less the commissions due the defendant for transacting such business for its principals, which commissions were based upon the gross freight collected; while the ships were in port, to attend to all mat-

ters pertaining to the immigration service, such as furnishing crew lists and securing identification cards for the seamen, and to assist the masters in all matters of local customs and regulations, with which they were, as a rule, not familiar. It alleged that the steamship agent in the various ports is absolutely essential to the transaction of the business of the ships engaged in interstate and foreign commerce, and that, without such agents, the ships so engaged could not do business.

Defendant pleaded that Ordinance No. 6608 of the Commission Council Series of the City of New Orleans, Section 29, and any other ordinance of the City of New Orleans, or statute of the State of Louisiana that could be construed to impose any license upon the defendant for engaging in such business, which was the only business the defendant was engaged in, were in contravention of Clause 3 (known as the Commerce Clause) of Section 8 of Article 1 of the Constitution of the United States, in that the exaction of such license would be an interference with, and a tax upon, interstate and foreign commerce.

The prayer was that the ordinance would be held in contravention of the Federal Constitution, and that the rule would be dismissed. (Record, pages 3 and 4).

Testimony was taken, and the matter was argued and briefed, and the Court held that the business in which the defendant was engaged was not interstate or foreign commerce, and that the ordinance did not contravene the Federal Constitution, and accordingly gave judgment for the City in the sum of four hundred dollars, with interest and penalties. (Record, pages 5, 6 and 7).

Richard M. Murphy, Commissioner of the Department of Finance of the City of New Orleans, was co-plaintiff in

the rule taken by the City. The judgment was in his favor as well as in favor of the City. The Commissioner is not made a defendant in this writ because he was not a necessary party and need not have been joined in the rule as a party plaintiff. He has no interest, either officially or personally, beyond that of the City. The parties to this suit, and also Murphy, Commissioner, have filed a stipulation to that effect. (Record, page 52).

The defendant appealed to the Supreme Court of the State of Louisiana. That Court affirmed the judgment of the Civil District Court and held that the ordinance did not contravene the commerce clause of the Federal Constitution. (Record, pages 32, et seq.)

There was an application for re-hearing, which was denied. (Record, pages 44, 45).

Thereupon, the defendant filed a petition for writ of error with assignments, and the writ was allowed by the Chief Justice of the Supreme Court of Louisiana. (Record, pages 47, 48).

FACTS.

The revenue ordinance of the City of New Orleans was not introduced in evidence, but its provisions were stipulated. It is the general revenue law of the City. It levies a graded license tax upon every business, trade or occupation that is subject to taxation. The tax levied upon the business of steamship agents is graded according to the gross receipts of the business for the year preceding the year for which the license is claimed, and it provides for a license tax of four hundred dollars when the gross re-

ceipts of the preceding year amount to one hundred thousand dollars or more, and it provides that "if the tax payer does not procure a license, it shall be enjoined from engaging in business in New Orleans." (Record, pages 10, 11).

The gross receipts of the defendant for the year 1921 were one hundred thousand dollars and over, and, if defendant can be required to pay a license for the year 1922, four hundred dollars is the amount provided for by the ordinance, and in such event, defendant became delinquent on March 1, 1922. (Record, page 11).

The facts in connection with the occupation of the plaintiff in error and its duties are well stated in the opinion of the Supreme Court of Louisiana. (Record, pages 32, 33 and 34):

> "The record does not show whether defendant is a domestic or foreign corporation; but that is a matter of no importance. The main office, or what is called the home office, of the company is in New York. The establishment in New Orleans, carrying on the business that is the subject of this litigation, is referred to in the testimony as a branch office. The company has a branch office or establishment also at Galveston and at Port Arthur, Texas, at San Francisco, Cal., at Savannah, Ga., and at Baltimore, Md. Whether the business done in each city is that of a separate corporation is left in doubt. However, the only business that we are dealing with in this case is that which is done in New Orleans, by the local establishment.
>
> "The business is confined to dealings with ship owners, charterers and operators, whose vessels trade between New Orleans and foreign ports and

between New Orleans and ports outside of Louisiana, in the United States. None of the ships from which the defendant company derives its business or patronage trades between New Orleans and another port in Louisiana, or between two ports in this state. In other words, all of defendant's patrons are ship owners, charterers or operators, engaged in either interstate or foreign commerce. Defendant represents four steamship lines regularly, under contract, for a commission fixed at a certain percentage of the gross amount of the freight charges collected by defendant for each steamship company. The four companies are the Compagnie Generale Transatlantique, carrying passengers and freight between New Orleans and Havre, Bordeaux, Antwerp, Hamburg and Bremen; the Holland-American Line, carrying passengers and freight between New Orleans and Rotterdam and Amsterdam; the Navigazione Generale Italiana, carrying freight between New Orleans and the Mediterranean ports; and the Toyo-Kisen-Kaisha, carrying freight between New Orleans and the Japanese and Chinese ports. Defendant also, occasionally, handles the business of tankers carrying fuel oil from New Orleans or from Baton Rouge, and of tramp ships taking cargo of sugar from New Orleans, all engaged in interstate or foreign commerce. In such cases, defendant's remuneration for the services rendered is not a commission, but, quoting from the testimony of defendant's local manager, 'the vessels are handled on a lump-sum basis—so much for handling the steamer.' Defendant's local manager admitted, too, in his testimony, that his company was always ready and willing to accept employment from any ship owner, charterer or operator, engaged in interstate commerce, at the port of New Orleans. All steamship traffic at this port is either interstate or foreign commerce.

"Defendant does not own or charter or operate ships, or share in the profits or losses of any ship owner, charterer or operator. Nor does any ship owner, charterer or operator share in the profits or lossees of defendant's business. The duties performed and services rendered by defendant—and by steamship agents generally—are: soliciting and engaging cargo for the ships, and nominating the ships for lifting the cargo; arranging for acceptance of delivery of cargo on the wharves; arranging with stevedores for discharging and loading cargo; issuing, in the name of the ship owner or charterer, bills of lading covering the cargo; arranging for bunkering and fitting the ships; collecting the freight charges due the ships; paying the ship's disbursements; attending to the immigration service, such as furnishing crew lists and obtaining identification cards for the seamen, and assisting the ship captains in all matters of local customs and regulations, with which, as a rule, ship captains are not familiar; and, finally, remitting to the ship owners or charterers the freight charges collected, less the ship's disbursements and the commissions due the steamship agent. The steamship agent has authority from his principal to quote freight rates, in soliciting cargo. He has authority also to buy fuel oil or coal for bunkering a ship, and to contract for fitting a ship, when that is necessary, for any special or peculiar cargo. The steamship agent has authority also to issue receipts, in the name of his principal, for cargo delivered on the wharf. The steamship agent is therefore, in many respects the local representative of any ship owner or charterer who has engaged his services.

"With regard to the employment of stevedores for discharging or loading cargo, the record in this case shows that the service is rendered by another

corporation, styled J. P. Florio & Co., Inc., which is a subsidiary of the defendant company.

The business of steamship agents is an extensive business in New Orleans, as it is in every large seaport. As a separate or an independent business, it is a result of the development of the country's commerce with foreign nations and among the several states. In the early days, when time was not so much the object or subject of economy as it is today, every ship's captain, for his own ship, discharged the duties and rendered the services for which local steamship agents are employed nowadays. But it would be impracticable now for a ship's captain to remain with his ship in port long enough to attend to the many matters which the local steamship agents can and do attend to for a ship at sea or in a foreign port. The business of steamship agents is therefore a necessary adjunct to commerce on the high seas." (Record, pages 32, 33 and 34).

II.

SPECIFICATION OF THE ERRORS RELIED UPON.

The following are assigned as error, (Record, page 47):

(1) The Supreme Court of Louisiana erred in holding that the business in which petitioner is engaged is a local business, separate and distinct from the business of interstate and foreign commerce, in which its principals are engaged.

(2) The Supreme Court of Louisiana erred in holding that petitioner and appellant is not engaged in interstate and foreign commerce.

(3) The Supreme Court of Louisiana erred in holding that the Ordinance No. 6608 of the Commission Council of the City of New Orleans does not, in so far as it requires of petitioner and appellant the payment of a license tax to carry on the business in which it is engaged, contravene Clause 3 (known as the Commerce Clause) of Section 8 of Article 1 of the Constitution of the United States.

(4) The Supreme Court of Louisiana erred in affirming the judgment of the Civil District Court for the Parish of Orleans, State of Louisiana, holding petitioner and appellant liable to the City of New Orleans for a license to engage in the business of interstate and foreign commerce.

These four assignments of error are reducible to the single proposition that the judgment which required the plaintiff in error to pay the City for a license to engage in interstate and foreign commerce is repugnant to Clause 3 of Section 8, Article 1, of the Constitution of the United States, commonly known as the Commerce Clause, in that it imposes a tax upon interstate and foreign commerce, and that, therefore, the Court below erred in not so deciding, and erred in rendering judgment against the plaintiff in error.

III.

ARGUMENT.

The only question that arises on this record is whether the ordinance of the City of New Orleans exacting, as the

price of its permission to engage in the business of acting as agent for steamship owners and operators exclusively engaged in the transportation of freight and passengers in interstate and foreign commerce, is a tax upon, and an interference with, interstate and foreign commerce.

To answer this question, it is necessary only to determine whether the business in which the plaintiff in error is engaged, is interstate or foreign commerce. If it be interstate or foreign commerce, then the license tax exacted of it, as a condition precedent to its carrying on that business, is a tax upon interstate or foreign commerce, and therefore violative of the Commerce Clause of the Constitution.

Beginning with *Brown versus Maryland*, 12 Wheaton, 419, 6 L. Ed., 678, this Court has held, in cases too numerous to cite, that the taxing power of the States cannot interfere with, or impose any tax upon, interstate or foreign commerce.

In *City of Saulte Ste. Marie versus International Transit Company*, 234 U. S., 333, 58 L. Ed., 1337, it was held that a carrier engaged in the transportation of freight and passengers by water in interstate and foreign commerce, cannot be required to take out a municipal license, and an ordinance imposing such license is in contravention of the Commerce Clause of the Federal Constitution. This proposition is well settled by the jurisprudence of this Court.

In the case now before this Court, the City of New Orleans is not attempting to require a license of principals

operating ships in interstate and foreign commerce, but is exacting a license from their agents in New Orleans.

We have, therefore, only to consider whether the agent who performs the acts that, but for him, the principal would have to perform, in the carrying on of the business of transporting passengers and freight in interstate and foreign commerce, is himself engaged in interstate and foreign commerce, or whether he is engaged in intrastate commerce.

This Court had occasion in 1890 to pass on this very question, in the case of *McCall versus The People of the State of California*, 136 U. S., 104, 34 L. Ed., 391. McCall was an agent in San Francisco for a railroad that carried passengers and freight in both directions between New York and Chicago. He had not taken out a license, as required by the California law. His duties were to solicit passenger traffic in San Francisco over the road he represented. He did not sell tickets to the passengers over the route, but took them to an office in San Francisco where the tickets were sold. The only duty he was required to perform for his company was to induce people taking a trip East to be booked over his line for that part of the journey from Chicago to New York and return. He neither received nor paid out any money or any valuable consideration on account thereof. He was convicted for doing this business without a license. The conviction was affirmed by the Supreme Court of California and brought to this Court on a writ of error. This Court said, in referring to the assignment that the law under which McCall was convicted was repugnant to the Commerce Clause of the Federal Constitution:

> "This proposition presents the only question in the case, and if it appears from this record that the business in which the plaintiff in error was engaged was interstate commerce, it must follow that the license tax exacted of him as a condition precedent to his carrying on that business was a tax upon interstate commerce and therefore violative of the Commerce Clause of the Constitution."

The Court reviewed its jurisprudence up to that time and quoted Pomeroy in his work on Constitutional Law, Section 378, referring to the signification of the word "commerce", as saying:

> "It includes the fact of intercourse and of traffic and the subject matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the means, instruments and places by, and in which intercourse and traffic are carried on, and further still, comprehends the act of carrying them on at these places and by and with these means. The subject matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons. All these may therefore be regulated."

The Court thereupon tested the case by the principles and definitions as laid down in the jurisprudence and in Pomeroy, and asked the question as to what was the business or occupation carried on by the plaintiff in error on which the tax in question was imposed. It said:

> "It is agreed by both parties that his business was that of soliciting passengers to travel over the railroad which he represents as an agent. It is admitted that the travel which it was his business to solicit is not from one place to another within the

State of California. His business therefore as a railroad agent had no connection, direct or indirect, with any domestic commerce between two or more places within the State. His employment was limited exclusively to inducing persons in the State of California to travel from that State into and through other States to the City of New York. To what then does his agency relate except to interstate transportation of passengers? Is not that as much an agency of interstate commerce as if he were engaged in soliciting and securing the transportation of freight from San Francisco to New York City over that line of railroad? If the business of the New York, Lake Erie & Western Railroad, in carrying passengers by rail between Chicago and New York and intermediate points, in both directions, is interstate commerce as much so as is the carrying of freight, it follows that the soliciting of passengers to travel over that road was a part of the business of securing the passenger traffic of the company. The object and effect of his soliciting agency were to swell the volume of the business of the road. It was one of the **'means'** by which the company sought to increase and doubtless did increase its interstate passenger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. A tax upon it, therefore, was, according to the principles established by the decisions of this Court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

It was argued that this soliciting of passengers in California for a railroad running between Chicago and New York, if connected with interstate commerce at all, was so remotely connected with it that the hindrance to the busi-

ness of McCall caused by the tax could not directly affect the commerce of the road because his business was not essential to such commerce. The Court said:

> "The reply to this proposition is that the essentiality of the business of the plaintiff in error to the commerce of the road he represented is not the test as to whether that business was a part of interstate commerce. It may readily be admitted without prejudicing his defense, that the road would continue to carry passengers between Chicago and New York even if the agent had been prohibited altogether from pursuing his business in California. The test is—Was this business a part of the commerce of the road? Did it assist, or was it carried on with the purpose to assist, in increasing the amount of passenger traffic on the road? If it did, the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent."

After citing *Robins versus Shelby County Taxing District*, 120 U. S., 489, 30 L. Ed., 694, and other cases, the Court held that the order for the violation of which McCall was convicted was repugnant to the Commerce Clause of the Federal Constitution. The McCall case was well considered, and, although the exact point appears never to have been presented to the Court again, this case has been cited, inferentially with approval and certainly without any criticism, in the following cases:

Norfolk & Western Railroad Co. vs. Pennsylvania, 136 U. S., 118, 34 Law Edition, 394; *Crutcher*

vs. Kentucky, 141 U. S., 58, 35 Law Ed., 649; *Pacific Express Co. vs. Seibert*, 142 U. S., 349, 35 L. Ed., 1035; *Ficklen vs. Taxing District of Shelby County, Tennessee*, 145 U. S., 1, 36 L. Ed., 601; *Brennan vs. City of Titusville*, 153 U. S., 289, 38 L. Ed., 719; *Hooper vs. California*, 155 U. S., 647, 39 L. Ed., 297; *Hopkins vs. U. S.*, 171 U. S., 578, 43 L. Ed., 290; *Williams vs. Fears*, 179 U. S., 270, 45 L. Ed., 186; *Stokard vs. Morgan*, 185 U. S., 27, 46 L. Ed., 785; *Atlantic & Pacific Telegraph Co. vs. City of Philadelphia*, 190 U. S., 160, 47 L. Ed., 995; *Norfolk & Western R. R. Co. vs. Sims*, 191 U. S., 441, 48 L. Ed., 254; *Western Union Telegraph Co. vs. Kansas*, 216 U. S., 1, 54 L. Ed., 355; *International Text Book Co. vs. Pigg*, 217 U. S., 91, 54 L. Ed., 678; *United States Fidelity & Guaranty Co. vs. Kentucky*, 231 U. S., 394, 58 L. Ed., 283; *City of Sault Ste. Marie vs. International Transit Co.*, 234 U. S., 333, 58 L. Ed., 1337; *Kansas City, Fort Scott & Memphis Railway Co. vs. Botkin*, 240 U. S., 227, 60 L. Ed., 617; *Cheney Bros. vs. Massachusetts*, 246 U. S., 147, 62 L. Ed., 632.

Under the circumstances, we cannot assume that this Court will care to re-examine the question involved in the McCall case. The states and municipalities have accepted the principles enunciated in that case. We say this because we have not been able to find where a single state or municipality, other than Louisiana and New Orleans, has attempted to exact a license of an agent acting exclusively for principals engaged in interstate and foreign commerce. Assuming that the law laid down in *McCall vs. California* is the settled jurisprudence of this Court, we shall confine our brief to the bearing of that authority upon

this case. McCall's principal was engaged in interstate commerce because it carried freight and passengers between different States. The Court held that McCall was engaged in interstate commerce because his occupation was one of the *means* which his principal employed for carrying on that business.

The agent in this case has no occupation except that of performing acts which, but for it, the principal would himself have to perform. It would hardly be practicable for steamship operators to be present in every port visited by their ships, and they must, in order to carry on their business, avail themselves of agents in the various ports of the world. McCall solicited passengers to book themselves by his line. The agent in this case solicits cargo to be booked by the ships operated by its principals. It enters and clears the ships, receives the outward cargo and attends to its loading on the ships, and to the discharging of the inward cargo and the delivery of it to the consignees, and it issues and executes, in the names of its principals, bills of lading covering the outward cargo. It also assists the master in complying with the requirements of local customs and immigration regulations, with which the masters are generally not familiar. These are all acts that the owner himself would have to perform unless he could engage an agent. In former times, the master, as bailee for the owner, attended to the business that is now done by the agent, but one of the most important elements in the ocean transportation business is the despatch of the steamer. One agent testified that cargoes are sometimes booked a year in advance, so that the ship operators may know what business they can expect, may so utilize their ships as to get the best despatch possible, and may have the cargo as-

sembled at the ports for the ships so that when the ships arrive, they will not have to wait for cargo. Another witness testified that, without agents at the various ports, it would take four or five times as much tonnage to carry on the interstate and foreign commerce of America as it now requires.

In the McCall case, this Court said that the essentiality of the agent was not the test. However, we submit that it is essential that steamship operators have agents in the various ports. The Supreme Court of Louisiana found as a fact that such agents were essential, but endeavored to weaken the effect of this finding by calling them "necessary adjuncts" [illegible]erstate and foreign commerce.

The only difference in the facts in the McCall case and in this case that we are able to find would not appear to affect the principles involved. McCall represented one principal, and the agent here represents four or five principals, and is ready and willing to represent more if they will appoint it. The Supreme Court of Louisiana assumes that McCall was paid a salary, whereas the agent in this case customarily receives a commission on the gross freight, and sometimes a lump fee for acting for the shipowner. As a matter of fact, the record in the McCall case, which we have examined, contains no allegation, no testimony, and no reference, as to how McCall was paid. The question of whether or not the agent in this case is engaged in interstate or foreign commerce on the one hand, or intrastate commerce on the other, surely is not affected by the number of principals represented by the agent or by the particular manner of compensating the agent. This proposition is so self evident as not to require, or even to permit, any elaboration. The suggestion is ventured, however, that it

is hardly possible that principals and agents could escape the regulatory power of Congress on the one hand, or that of the States on the other, by adopting the plan of paying their agents for their services a salary or a commission.

The test is what is the business of the principal and what is the occupation of the agent? If the principal's business is interstate and foreign commerce and the agent's business is carrying on the business of the principal, the business of the agent is interstate and foreign commerce, whether he is paid a salary, a commission, a percentage of the profits, or a lump sum for each ship in respect of which he acts for his principal and regardless of whether he acts for one principal or for many.

Large steamship companies frequently employ a sole agent in a port. That is merely because they have enough business to take up all of the time of an agent and that will be sufficient to justify the expense of carrying on such a sole agency. However, there are many small ones that require the services of an agent and will avail themselves of the opportunity to employ in the various ports agents who have an office and an organized force of clerks, and who have experience, and who act as agents for a number of principals, and surely these circumstances, which arise purely from considerations of economy, would not have the effect of converting a concern engaged in interstate and foreign commerce into one engaged in intrastate commerce. During the war, the Railroad Administration consolidated the ticket offices in many of the Cities, thus using one agent for many carriers. It will not be contended, surely, that, as a result of this economical move, the Federal Government lost the power to regulate the agent for carriers engaged in interstate commerce. We shall not

dwell on this point further, because we are unable to apprehend the slightest reason for thinking that either the manner of compensating the agent, or the number of the principals appointing the agent, has anything to do with the question of whether or not the commerce carried on by the agent is interstate or foreign on the one hand, or intrastate on the other.

Certainly the Congress has always regarded itself as having power to regulate an agent representing a principal engaged in interstate and foreign commerce. The Acts of Congress showing this are too numerous to cite, but we might mention the Harter Act, Act of February 13, 1893, making it unlawful for the agent of any vessel transporting merchandise or property between ports of the United States and foreign ports, to insert in a bill of lading a clause relieving parties from liability or damage arising from negligence, etc. The Harter Act also provides that the agent shall not be held responsible for damage or loss resulting from errors in navigation or in the management of the vessel when she has been properly equipped, manned and supplied. Then there are statutes requiring agents to give notice when they have reason to fear that a vessel is lost. There is a statute making it unlawful for the agent of any carrier to disclose information about a shipment to any person other than the shipper or consignee without their consent. Congress derives its power to enact such statutes from the Commerce Clause of the Federal Constitution, and it is competent for Congress thus to regulate agents for carriers in interstate and foreign commerce, because such agents are engaged in an occupation that is a means of carrying on interstate and foreign commerce.

The Supreme Court of Louisiana preferred to follow

Ficklen versus Shelby County Taxing District, 145 U. S., page 1, 36 L. Ed., 601. It attempted to reconcile this case with *McCall vs. California* in their applicability to the case at bar. The Ficklen case was a very unique case, and this Court evidently did not regard it as overruling *McCall vs. California*, because this Court in the Ficklen case cited *McCall versus California* with approval. So that the Ficklen case might not be construed as unfavorably affecting prior jurisprudence, the Court made a reservation at the conclusion of its opinion, which greatly impaired the force of the case as a precedent. The concluding words of the opinion of the Court in the Ficklen case are as follows:

> "What position they would have occupied if they had not undertaken to do a general commission business and had taken out no license therefor, but had simply transacted business for non-resident principals, is an entirely different question which does not arise upon this record."

In the case of *Crew Levick Company vs. Pennsylvania*, 245 U. S., 296, 62 L. Ed., 295, this Court, in referring to the Ficklen case, again impaired its force as a precedent by saying:

> "Undoubtedly that case is near the border line; but we think its authority would have to be stretched in order to sustain such a tax as is herein questioned. Consistently with due regard for the Constitutional provisions, we are unable thus to extend it. In that case the complaining parties were established in business within the taxing district as general merchandise brokers and had taken out general and unrestricted licenses to do business of all kinds, both

> internal and interstate. As it happened, one of them (Ficklen) during the year in question, did an interstate business exclusively, and the other (Cooper & Company), did a business nine-tenths of which was interstate."

And the Court concluded the paragraph in which this language is found by saying:

> "For this and other reasons, the case has been deemed exceptional."

In the case of *Hopkins versus United States*, 171 U. S., 578, 43 L. Ed., 290, this Court, in referring, with approval, to *McCall vs. California*, said that that case

> "is cited for the proposition that the solicitors employed by these defendants are engaged in interstate commerce. In that case the railroad company was itself engaged in such commerce and its agent in California was taxed by reason of his business in soliciting for his company that which was interstate commerce. The fact that he did not sell tickets or receive or pay out money on account of it was not regarded as material. His principal was a common carrier, engaged in interstate commerce, and he was engaged in that commerce because he was soliciting for the transportation of passengers by that company through the different States through which the railroad ran, in the State of California."

Again this Court, in the case of *Williams vs. Fears*, 179 U. S., 270, 45 L. Ed., 186, said:

> "In *McCall vs. California*, we held that the agency of a line or railroad between Chicago and New York, established in San Francisco for the pur-

> pose of inducing passengers going from San Francisco to New York to take that line at Chicago, but not engaged in selling tickets for the route, or receiving or paying out money on account of it, was an agency engaged in interstate commerce. But there the business was directly connected with interstate commerce, and consisted wholly in carrying it on. The agent was the agent of the transportation company, and he was acting solely in its interests."

In the case at bar, this agent does nothing but carry on the business of its principals who are engaged in interstate and foreign commerce.

Again, in the case of *Stockard versus Morgan*, 185 U. S., 27, 46 L. Ed., 785, this Court, in referring with approval to *McCall vs. California*, said:

> "These cases exhibit different phases of the same general principle, but all follow that principle as announced in the Robbins case, and deny the right of the state to tax people representing the owners of property outside of the state, for the privilege of soliciting orders within it as agents of such owners for property to be shipped to persons within the state."

In the case of *United States Fidelity & Guaranty Company vs. Kentucky*, 231 U. S., 394, 58 L. Ed., 283, this Court, again referring with approval to *McCall vs. California*, said:

> "In the McCall case, the local instrumentality that was held to be exempt from interference by state taxation was an agent whose business was the direct solicitation of passengers for interstate journeys by rail."

In the case of *Cheney Bros. Co. vs. Massachusetts*, 246 U. S., 147, 62 L. Ed., 632, this Court, in again referring with approval to *McCall vs. California*, said:

> "We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation."

From the time *McCall vs. California* was decided, that is, in 1890, continuously through the years down to and including 1916, when the case we have last cited was decided, this Court has referred, always with approval, to the McCall case, and has never once altered the rule therein stated.

In the case of *Brennan vs. City of Titusville*, 153 U. S., 289, 38 L. Ed., 719, this Court, in referring to *McCall vs. California*, quoted as follows from Mr. Justice Bradley, in the case of *Leloup vs. Mobile*, 127 U. S., 640:

> "Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business."

In conclusion, the agency here involved relates solely to interstate and foreign commerce; every act the agent performs is an act which its principal, but for such agent, would have to do to prosecute its business of transporting freight and passengers in commerce "between the States

and foreign nations." The occupation of this agent is one of the means of carrying on that commerce and is exclusively devoted to that purpose. The agent acts solely in the interest of these carriers in interstate and foreign commerce, and any burden upon, or interference with, its occupation, is a burden upon, and an interference with, the business in which the principal and the agent are engaged, that is, the transportation of freight and passengers in interstate and foreign commerce.

It would be an anomaly for common carriers in interstate and foreign commerce to be under Federal regulation and for their agents, in respect of such commerce, to be under State regulation. Many carriers in foreign commerce are never present in this country and never, therefore, within its jurisdiction, except through agents, and, if these agents are subject to State and not to Federal regulation, the Congress will be shorn of much of its power under the Commerce Clause.

The judgment of the Supreme Court of Louisiana should be reversed and the ordinance of the City of New Orleans, in so far as it applies to the business of the plaintiff in error, should be declared to be in contravention of the Constitution of the United States.

Respectfully submitted,

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Attorneys for The Texas Transport & Terminal Company, Incorporated, Plaintiff in Error.

New Orleans, La., March 12, 1923.

NOV 5 1923
WM. R. STANSBURY

United States Supreme Court.

OCTOBER TERM, 1923.

No. 141

THE TEXAS TRANSPORT & TERMINAL COMPANY, INCORPORATED,

Plaintiff in Error,

versus

THE CITY OF NEW ORLEANS,

Defendant in Error.

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

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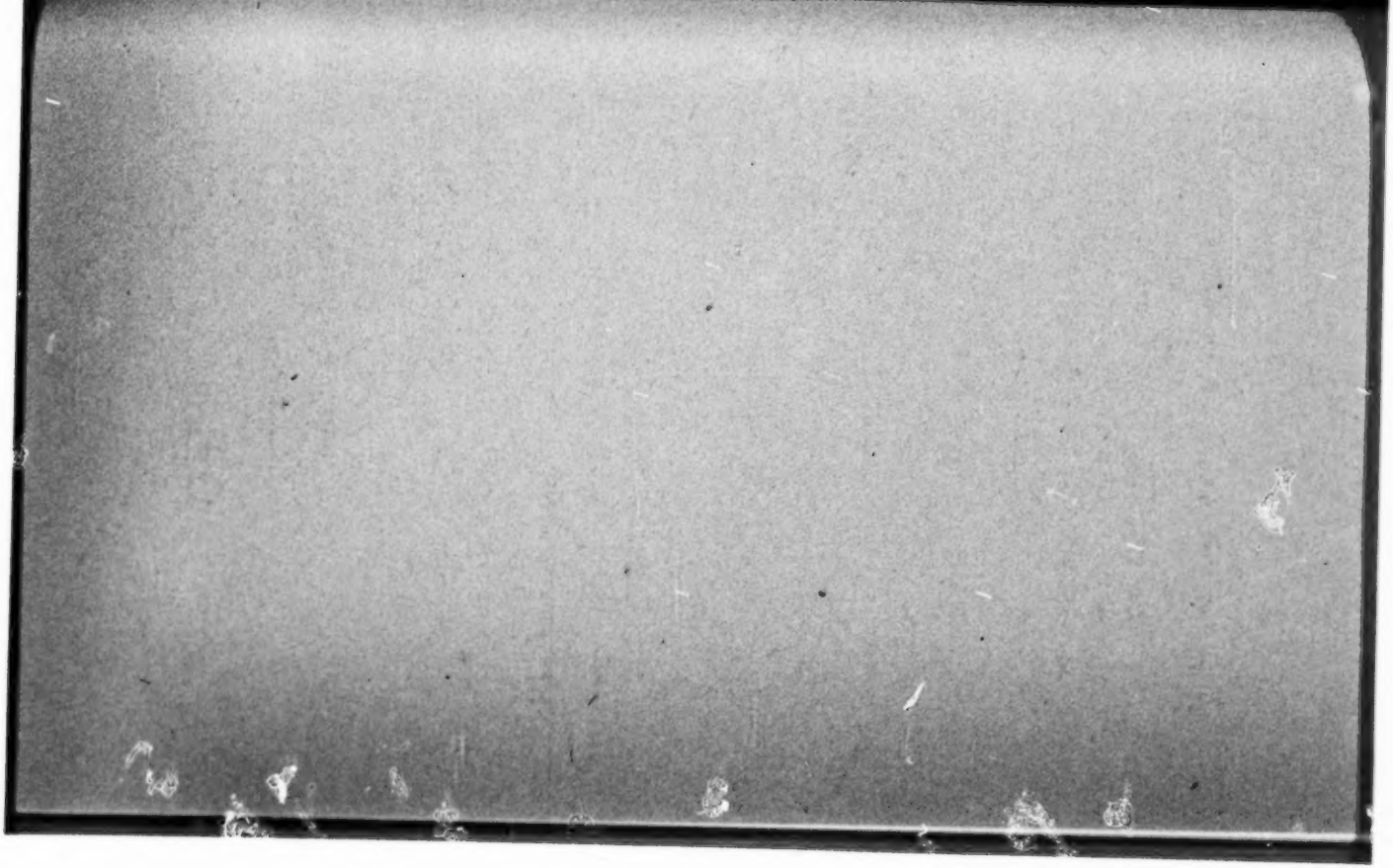

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THE TEXAS TRANSPORT & TERMINAL COMPANY, INCORPORATED,

Plaintiff in Error,

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THE CITY OF NEW ORLEANS,

Defendant in Error.

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

In our original brief, we did not quote from the ordinance levying the tax. This seemed unnecessary, as the effect of the ordinance was stipulated and as there is no dispute as to its interpretation.

However, as the rule of court may be construed to re-

quire that the pertinent provisions of the ordinance be set forth in the brief, we ask leave to file this supplemental brief, in which is set forth so much of the ordinance as may be necessary to decide the case.

Ordinance No. 6608 of the Commission Council Series of the City of New Orleans reads as follows:

> "AN ORDINANCE levying license taxes for the year 1922, and providing for the collection thereof.
>
> Section 1. Be it Ordained by the Commission Council of the City of New Orleans that license taxes for the year 1922 are hereby levied upon every person, association of persons, firm or corporation pursuing any trade, profession, vocation, calling or business that may be rendered liable to a license tax, as follows, to-wit:
>
> **************
>
> Section 29. Every individual, firm, association or corporation, carrying on the profession or business of draying, trucking, keeping cabs, carriages, hacks, horses or motor vehicles for hire, undertaker, funeral director, steam or electric laundry business, agency for steamboats and owners or lessees of toll bridges or ferries, stevedores and those engaged in the business or profession of bill posting, tacking or advertising, the license shall be based upon the gross annual receipts from such profession or business, and shall be fixed and graded, as follows, to-wit:
>
> **************
>
> First Class.—When the gross receipts are one hundred thousands dollars or more, the license shall be four hundred dollars ($400).

****

Section 40. All licenses shall be due and collectable during the first two (2) months of each year, and all unpaid licenses shall become delinquent on the first day of March of each year, and all persons, firms, association of persons and corporations who commence business after that date shall become delinquent unless the license is paid within ten days after commencing business.

Section 41. All unpaid licenses shall bear interest at the rate of two per cent per month from the first day of March, and the payment thereof shall be secured by first lien and privilege in favor of the City upon the property, movable and immovable, and the Commissioner of Public Finances shall collect said license and interest in the manner provided by existing laws.

****

Section 52. If any business shall be conducted without a license, in case herein provided, the officer whose duty it is to issue licenses, shall, through the city attorney, on motion in the proper courts as provided in the Constitution, and which shall be without deposit or advance cost, take a rule on the party or parties doing such business to show cause, on the fifth day exclusive of holidays, after the service thereof, which may be tried out of term times and in chambers, and shall always be tried by preference, why said party or parties should not pay the amount of the license claimed and penalties, or be ordered to cease from further pursuits of said business, until after having obtained a license; and in case said rule is made absolute, the order thereon rendered shall be considered a judgment in favor of the city, for the

amount decreed to be due by the defendant for license and penalty and costs heretofore and herein above provided for, and shall be executed in the same manner as other judgments, and every violation of the order of the court shall be considered as a contempt thereof, and punished according to law.

Section 53. On all license claims placed in the hands of the City Attorney, the City Attorney shall claim, in addition to all other costs and penalties, ten per cent upon the aggregate of the license and penalties, as attorney's fees for the benefit of the General Fund of the City of New Orleans. (Act 115 of 1921.)

Respectfully submitted,

GEORGE H. TERRIBERRY,

JOSEPH M. RAULT,

Attorneys for The Texas Transport & Terminal Company, Incorporated, Plaintiff in Error.

New Orleans, La., November 5, 1923.

JAN 5 1924
WM. R. STANSB
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No. [redacted]141

OCTOBER TERM, 1922.

In the

Supreme Court of the United States

THE TEXAS TRANSPORT AND TERMINAL COMPANY, INCORPORATED,

Plaintiff in Error,

versus

THE CITY OF NEW ORLEANS,

Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

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No. 672.

OCTOBER TERM, 1922.

In the

Supreme Court of the United States

THE TEXAS TRANSPORT AND TERMINAL COMPANY, INCORPORATED,

Plaintiff in Error,

versus

THE CITY OF NEW ORLEANS,

Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

May It Please the Court:

In this case the City of New Orleans, defandant in error, sues the Texas Transport & Terminal Company, plaintiff in error, for a license for engaging in the business of steamship agent during the year 1922. The pleadings, facts and specification of errors are stated in the brief of plaintiff in error (pp. 1 to 10, incl.). We will supplement them only by the following brief statement.

Though the bulk of the business done by plaintiff in error consisted of services rendered to certain steamship lines and tramp steamers engaged in foreign commerce, nevertheless the

testimony nowhere shows that the business of plaintiff in error is, either in its nature or by intent, confined to serving said particular steamship lines and tramp steamers, or to serving steamship lines and steamers engaged in foreign commerce; but on the other hand, the testimony does show that plaintiff in error is "very willing to act for all principals that will engage their services" (Tr. p. 15), and to "render service to anybody and take agency from any one from any port in the world" (Tr. p. 15). The testimony also shows that all business done by plaintiff in error is begun, transacted and completed locally, in the City of New Orleans (Tr. pp. 16, 17, 18). Thus the steamship agency business of plaintiff in error is shown to be a general business, not identified with any particular steamship line or lines, but separate and distinct therefrom, and extending or open to any and all steamship lines and steamers whatsoever, including those engaged in intrastate commerce, as well as those engaged in interstate and foreign commerce.

The issue herein is whether or not a license tax levied on this sort of business is repugnant to that provision of the Federal Constitution which gives Congress power "to regulate commerce with foreign nations and among the several States."

ARGUMENT.

The issue involves two inquiries: First, is the business or industry interstate commerce?

Second, is the tax a direct tax on interstate commerce such as would amount to a burden on and a regulation thereof forbidden by the United States constitution?

Does the license tax levied by the City upon the plaintiff in error in this case amount to a regulation of interstate commerce violative of the Federal constitution? We submit that

it cannot amount to a regulation of interstate commerce unless it is a tax directly on that commerce; and that if its effect be "indirect, incidental or remote so as not to burden or impede such commerce," it is not in conflict with the constitution of the United States.

In *McCall vs. California*, 136 U. S. 104, relied on by appellant, interstate commerce is defined:

"Commerce with foreign countries and among the states, strictly considered, consists of intercourse and traffic, including in these terms navigation and transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities."

We accept the definition.

We propose to show that plaintiff in error's business does not come within the definition, and that hence the license tax imposed upon it is not a direct tax amounting to a "regulation" of interstate commerce, and if connected with the latter at all is only remote or hazily indirect.

Plaintiff in error claims that identifying seamen, buying coal and other provisions, securing stevedores for loading and unloading ships, and other like services, are interstate commerce, and that to require a steamship agent holding itself out to do a general business along those lines to pay a license to the City of New Orleans, similar to that charged every other agency and every attorney-at-law in this city, would amount to a regulation of commerce in violation of the Federal Constitution. If plaintiff in error is engaged in interstate commerce, then *quoad* such practice as this its counsel now before this Honorable Court is engaged in interstate commerce and owes no license to the city, for what is the difference between plaintiff in error collecting the freight due the ship and an attorney-at-law collecting freight or debts due the ship? If it is interstate commerce for plaintiff in error to procure coal for the ship, then the vendor of the coal

owes no tax or license for selling the coal to the ship, and his lessor owes no tax or license for the premises rented to the vendor of the coal; and the seller of the mules or motor trucks to the coal vendor, *quoad* coal delivered to such ships, owes no license or tax on the mules or trucks; nor does the grain dealer who sells the feed for the mules engaged in hauling this coal owe either license or tax; nor do market people, butchers, vegetable venders and grocers owe licenses or taxes if they can show that, though they hold themselves out to serve the whole public, the major part of their business is with steamships coming to this port and engaged in interstate commerce, and that hence they, themselves, are really engaged in interstate commerce. Follow plaintiff in error in contention and it leads to a *reductio ad absurdum*. Following plaintiff in error in contention, this city should at once curtail her strenuous efforts to enlarge her business as a port, and to increase her population. If plaintiff in error be correct then the millions of dollars that this city has spent, is still spending and owes for her publicly owned docks and industrial canal will probably never be paid because of the paradoxical fact that just in proportion as she increases her foreign and through traffic, and has not only the six-mile river front, but also the several miles of canal alive with ships, with huge trunk lines of railroad working to the full capacity, of elevators carrying foreign routed grain, just in proportion must the city become poorer and poorer and call on the balance of the people to support this enormous class, all of whom will pay neither license nor tax on the ground that they are engaged in interstate commerce. Think for a moment of the extra cost alone of the police and fire departments, to say nothing of paving, lighting and water, to care for this huge foreign industry and the accompanying growth of the population of the city, and yet, as to the city's exchequer, the steamship owners, steamship agents, coal vendors, railroads, even the laborers would be

deadheads; all will pay nothing, but the balance must support them. Perhaps it will be that the city will rue the day that it undertook this enormous dock extension system to bid for interstate commerce, but we do not believe that this Court will follow the strained and reactionary decision of the *McCall case*, relied on by appellant, even were the facts of that case the same as those of this case, which we deny.

We submit that the tendency of litigation in late years has been to stretch Article I of the United States constitution to the breaking point, encroaching more and more on the rights of the States to conduct their internal affairs as they see fit without being hailed before the Federal courts as violating the national constitution. Under our scheme of government, all doubts must be decided in favor of the State, because all powers are lodged in the State except those that have been specifically and expressly conferred upon Congress by the Constitution of the United States. Therefore such powers should be strictly construed. This doctrine the Supreme Court of the United States, we are glad to say, is now adhering to in spirit and letter, more so than it did when Justice Harlan, the noted advocate of centralized federal power, and Justice Lamar sat in that court. No better illustration of the present tendency is at hand than the recent decisions of this same court since the McCall case in 1889.

The McCall decision, from which Chief Justice Fuller and Justices Gray and Brewer dissented, is not reasoned out, is but a few pages in length, and settles the question by considering in a terse manner some half dozen decisions of the Supreme Court. All of the facts that can be gleaned are that McCall was the direct representative in San Francisco of the New York, Lake Erie and Western R. R. Co., domiciled in Chicago, and operating between that city and New York, and that his duties were those of a special drummer soliciting passengers

to go East over his principal's road from Chicago to New York. He did no other work. The presumption must be that he received a salary.

Note that even Justices Lamar, Harlan, et al., in that case wobbled in their definition of interstate commerce. At page 108 it is said that interstate commerce embraces "all the means and instruments" by which it is carried on, and that McCall and his business constituted such; while on page 113 the decision approves *Smith vs. Alabama*, that sustains a State license on an engineer operating an interstate train, saying that, "so far as it affected commercial transactions among the states *its effect was so indirect, incidental* and *remote* as not *to burden or impede such commerce.*" We would ask (and we are sorry we cannot ask Justice Lamar) if an engineer running a train in interstate commerce, which train earns thousands of dollars of freight, is not a more direct "means and instrument" of interstate commerce than is the drummer who takes orders for part of the freight that is carried on that train? Presuming that McCall sold enough tickets to fill a train from Chicago to New York, we can say without contradiction that the crew, including conductor, fireman, engineer, brakeman, switchmen, the Pullman conductors, etc., that run that train from Chicago to New York would cost far more to the company than would be the cost in salary of McCall for securing the passengers. If McCall's work in securing the passengers was interstate commerce, if it was, in words of the decision, "a means and an instrument" for making that commerce larger, then we respectfully ask how much more so was the service of the train crew proper, Pullman car conductors, porters, dining car employees, etc., in carrying those passengers from Chicago to New York. And yet the great McCall case says that a license on a locomotive engineer was so remote and indirect as not to be a regulation of interstate commerce, notwithstanding that the

engineer was directly engaged in the actuality of the thing, in driving the engine, etc., without whose services the railroad would have been worthless, the train so much junk, and the passengers suing for damages and for the return of their money. Was not the engineer necessary to that interstate commerce? He was the acting head, the directing genius, on the spot, who more than president, board of directors, ticket agents, or anybody else actually drove the engine and train over the tracks and had more to do with very penny earned in their interstate commerce business than a hundred McCalls 3000 miles off in California could have had. Yet in the McCall case, McCall, then in San Francisco soliciting passengers, was considered to be engaged in interstate commerce so that he could not be compelled to pay a license, while Smith, the engineer in Alabama who was actually by his skill conducting the train and hauling passengers in interstate commerce, could be taxed a license because such tax was incidental to, and hence not a burden on, interstate commerce. We submit that without going any further, the Court is bound to hold that the McCall decision is contradictory and inconsistent.

Certainly if Smith, the locomotive engineer, carrying passengers in interstate commerce could be made to pay a license, then the plaintiff in error, not a hired, skilled and direct representative, but only an independent broker engaged in an agency business in New Orleans, doing at best one or two things remotely connected with interstate commerce, should also pay a license.

If counsel relies on the McCall decision, then he is bound to argue before this court that we could charge a license to every engineer, pilot and captain on each ship of the four companies (clients of plaintiff in error) coming into this port, because their duties are only "remotely and indirectly connected with interstate commerce," while at the same time we could charge

no license to plaintiff in error, because they are far more directly engaged in interstate commerce than are the captain, engineer and pilot of each of the ships, whose coal he engages, and for which he engages stevedores to unload. There is no escape from this conclusion.

In view of this, what is remote? What is direct? Or is it left to the Court in each case? A license on Smith, the locomotive engineer running a train from Chicago to New York, is valid because Smith is only remotely or indirectly engaged in interstate commerce, if at all. A license on McCall, the drummer over in San Francisco, soliciting passengers to ride on Smith's train, is unconstitutional, because McCall is directly engaged in interstate commerce. Is this the law? Certainly it is the law laid down in the McCall decision.

We might contend that to tax by license a salaried agent in an office rented by the railroad might be a direct regulation and burden on interstate commerce, and hence illegal, whereas if the agent was an independent broker working for a commission only and did the same work, a license on him would be legal and not a direct burden and regulation of commerce. That, however, is not the contention we make. But the only theory, the only possible hypothesis upon which the Court in the same decision could have approved both *Smith vs. Alabama* and *McCall vs. California* is predicated substantially on that very statement. Else the decision would be ridiculous in its inconsistency and contradiction. What we do argue is that in order for a tax to amount to a regulation of interstate commerce it must be levied on interstate commerce itself or so directly affect interstate commerce that it would be reflected in the expenses, receipts and profits of the very business of carrying on that interstate commerce; and if any decision was ever written to confirm and buttress that understanding and definition of the proposition, it is the McCall case.

McCall's services, which in reality, as the Court says, were only a "means or assistance in increasing the amount of passenger traffic," though not directly interstate commerce, are considered such when the charge or license for doing that business results in a direct charge on his principal who is engaged directly in interstate commerce, and hence becomes a prohibited burden on and regulation of that commerce. But if an independent agent, broker or commission merchant perform the same service that McCall did, and was paid a commission by his principal, a State law charging him a license predicated on the gross amount of his commissions would be legal and valid, because the license would be paid by him personally on the gross amount of *his* business, which is not interstate commerce, and because the license would not be paid by his principal (who paid it in the McCall case), the proof of which would be that no such charge could or would appear on the books or records of the principal. Hence, in the words of the McCall decision, that license would not be in the nature of a regulation of interstate commerce, but its effect would be "so indirect, incidental and remote as not to burden or impede such commerce." Whose commerce? Those engaged directly in interstate commerce, to-wit, the four steamship lines, clients of plaintiff in error.

Again we respectfully submit that our explanation irons out the apparent contradiction not only in this McCall decision, but as between the numerous cases decided first one way and then the other by the Supreme Court of the United States. Upon what other grounds can the McCall and the Ficklen cases, absolutely antagonistic, be reconciled? Justice Pitney and other jurists have never hit upon a satisfactory explanation of those two contradictory decisions, neither of which has been over-ruled. There must be some consistency, somewhere or somehow, between them, else they would not both have stood

for over thirty years, notwithstanding the numerous occasions on which the Supreme Court has since considered them.

Neither decision argues out the question nor treats the subject at length in a philosophic manner. We submit that our hypothesis is the only true one and that through which the apparent conflicts can be reconciled and the jurisprudence be demonstrated to be consistent.

In the *Ficklen case*, 145 U. S., p. 1, decided in 1892, Ficklen was a commercial agent or merchandise broker in Memphis, Tenn. He had no capital, was neither buyer nor seller of merchandise, but engaged exclusively in negotiating sales for his principals, just as a drummer does, only he was stationary in Memphis, where he exhibited samples and took orders for sales of merchandise for his principals, all of whom lived in other states, from which the merchandise so sold was to be shipped into Tennessee. The license was to be a flat $50 and, in his case, "two and a half per cent on the gross yearly commissions, charges or compensation for such business." The court held this license not an interference with interstate commerce.

Ficklen sold the goods for clients engaged in interstate commerce in other states. McCall sold tickets for a client engaged in interstate commerce in another state. The license on McCall was held to be a direct burden and regulation on interstate commerce. The license on Ficklen (two years later) was held to be legal and not a burden and regulation on interstate commerce. At page 24, Chief Justice Fuller in the decision makes this statement:

> "This tax is not on the goods or on the proceeds of the goods. Nor is it a tax on non-resident merchants. If it can be said to affect interstate commerce in any way it is incidentally and so remotely as not to amount to a regulation of such commerce."

At page 21 the Court further says:

> "And where a resident engages in such general business subject to a particular tax, the fact that the business done chances to consist for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution."

Almost the identical language that Justice Lamar used in the McCall case, in approving *Smith v. Alabama*. What were the sole and only facts in common between Smith and Ficklen? Each was the means or instrumentality in assisting interstate commerce, each individually paid a license "that did not necessarily involve the taxation of interstate commerce." But McCall, so counsel says, did just what Ficklen did, and the same judge that said Smith's license was "indirect and remote," said McCall's license was a direct regulation. Why? Because it was reflected in the railroad charges and hence was a burden on them, while neither Ficklen's license nor Smith's license was a direct burden on the principal. Yet the same Judge Harlan that approved of the Smith case, wrote a dissenting opinion in the Ficklen case. Probably in his youth he had been a traveling salesman; if that be wrong, then his mind worked in channels incomprehensible to an ordinary intellect.

It is to be noted also that though, as a matter of fact, each and every act done by the complainants in the *Ficklin case* in the conduct of their business, each and every sale made by them, was an act or sale in interstate commerce, nevertheless the Supreme Court of the United States held, after taking cogniaznce of this feature of the case, that the complainants were, nevertheless, subject to the payment of a license because they had undertaken to do "a general commission business," and by way of distinction said that the case would be different had they "simply

transacted business for non-resident principals." In other words, this case clearly recognizes the distinction between a simple agency for non-resident principals and a general commission business, between merely acting for a non-resident principal and doing a business in which transactions for non-resident parties forms a part. The *Ficklin case* is, therefore, practically on all fours with the case at bar, where the plaintiff in error (even if it be conceded that plaintiff in error's services really constitute acts in interstate or foreign commerce) has undertaken to do a general steamship agency business—has not merely undertaken an agency, but has undertaken a business—or, as admitted by plaintiff in error's own counsel, it is "willing to act for all the principals that will engage its services and renders service to anybody and takes agency from anyone from any part of the world," and this it undertakes to do regardless of whether the acts it will be required to do in the discharge of the business committed to it constitute interstate commerce or not.

On page 21 of his brief in this Honorable Court, Counsel quotes the concluding words of the opinion of this Honorable Court in the *Ficklin case*:

> "What position they would have occupied if they had not *undertaken* to do a *general commission* business and had taken out no license therefor, but had simply transacted business for non-resident principals, is an entirely different question which does not arise upon this record."

This notwithstanding the fact that in the statement of the case on page 1, the Court says of Ficklin's business, that all of it was "on behalf of principals residing in other states, and the goods so sold were, at the time of the sales, in other states, to be shipped into Tennessee as sales should be affected."

Note that in the first quotation, the one quoted in his brief, the language is what position they would have occupied if they

had not undertaken to do a general business, etc., and then the Court says in the second quotation by ourselves that as a matter of fact, like plaintiffs in error, the business they actually did was all *interstate* commerce. Note the deadly parallel between the case at bar and the *Ficklin case*. On transcript, page 15, the Judge of the Civil District Court in trying to get at the business done by plaintiffs in error asked of the Manager of the Texas Transport and Terminal Company, plaintiffs in error:

"What I mean by the word 'general'—it is rather more comprehensive than it should be—what I mean is that it is general (the business done by the witness) in the sense that you render service to anybody and take agencies from anyone from any part of the world."

Answer: "Yes."

Counsel in this case on transcript, page 15, says: "We admit that they (his clients) are very willing to act for all the principals that will engage their services.

The above needs no argument to show that plaintiffs in error have also during the year for which the license is charged "undertaken to do a general commission business" as steamship agents or brokers and therefore their own admissions coupled with their own quotation from the *Ficklen case* we repeat shows that this case is on all fours with the *Ficklin case* and is in effect a perfect and deadly parallel to that case.

The thing that is laid hold of as the subject of the license is a business carried on within the City of New Orleans. Plaintiff in error is asked to pay a license, not as the agent of certain interstate and foreign shipping companies, but because it carries on a local business or occupation of its own and for its own account and profit, a business consisting of the rendition of certain services to steamship companies, which it undertakes to render for a commission or percentage remuneration and regard-

less of whether or not that service involves interstate commerce, just as a drayman undertakes to carry goods by dray, regardless of whether or not those goods are to constitute an interstate shipment, and just as the complainants in the *Ficklin case* undertook to sell goods on a commission basis regardless of whether or not all sales made by them should be acts of interstate commerce. That the drayman would not be exempt from a license is certain; that the general commission merchant is not exempt is settled by the *Ficklin case*, and that a general commission steamship agency business is not exempt follows conclusively from a consistent application of sound reasoning to an absolutely parallel case.

In his dissenting opinion on page 27, Justice Harlan approves *Norfolk R. R. Co. v. Pennsylvania*, 136 U. S. 114, forbidding a tax by the State on an interstate railroad for keeping an office in Philadelphia. The tax on the railroad was a tax on interstate commerce. Correct. Yet in the Smith case he joins in the decision, holding that the license tax of a locomotive engineer of an interstate commerce railroad was legal because the tax was remote and indirect. How can his apparent inconsistency be explained except on the only irresistible theory that had the railroad paid the license of its engineer, as it did for McCall, and as it did for the office in the Norfolk Railroad case, it would also have been unconstitutional? If he holds that Smith was not in interstate commerce in his dissenting opinion in the Ficklin case, why was he not consistent and why did he not also hold that a license paid by Ficklen on his gross commissions was not, any more than in the engineer's case, a direct tax and burden on the principals engaged in interstate commerce? We do not know and unfortunately the distinguished jurist is with us no longer, nor is his former sympathetic associate, Justice Lamar.

Later, in 1904, Mr. Justice Brewer, who, it will be recalled, dissented in the *McCall case*, expressed his views on the subject

in a short and to the point decision in the case of *State of New York, ex rel. Penn. R. R. v. Knight*, 192 U. S., 21. The facts in the case are as follows:

The Pennsylvania Railroad Company established a cab stand on its premises at the Twenty-third Street Ferry in New York and maintained a service of cabs and coaches. The business done by these cabs and coaches consisted in bringing the company's passengers to and from its ferry. The railway company contended that the cab service was merely an extension and, therefore, a part of interstate transportation; that it was not carrying on a cab service generally in the City of New York, but was merely furnishing the service to those who seek to undertake an interstate journey over its lines, thus commencing the journey from their hotels instead of from the ferry landing or like service to those who have already received such interstate transportation, thus completing the transportation to their places of destination. In other words, the company, in order to promote its general business, sought only to complete the continuous transportation of interstate passengers to or from the residence or hotel of its passengers instead of commencing and ending such transportation at the ferry landing on Twenty-third Street.

Mr. Justice Brewer held:

> "As we have seen the cab service is rendered wholly within the State and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a State it is presumably subject to State control. The burden is on him who asserts that, though actually within, it is legally outside the State, and unless the interstate character is established locality determines the question of jurisdiction."

And further on in the same decision Mr. Justice Brewer said:

> "As shown in the opinion, from which we have just quoted, many things have more or less close relation to interstate commerce, which are not properly to be regarded as a part of it. If the cab, which carries the passengers from the hotel to the ferry landing, is engaged in interstate transportation, why is not the porter, who carries the traveler's trunk from his room to the carriage, also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed? We are of opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation."

We submit that the learned counsel for the Texas Terminal & Transportation Company, Inc., has not shown, and that he cannot show, that his client is actually and exclusively engaged in interstate or foreign commerce, but, on the other hand, he has simply shown that his client is engaged in a general, independent brokerage business, a part of which business is preliminary to or subsequent to interstate or foreign commerce, and that the connection that it has with interstate commerce as such is only incidental and very remote. Adopting Justice Brewer's words in the *Pennsylvania case*, we ask:

"And where will the limit be?"

Defendant employs stevedores to load and unload the cargo; it employs sailors and obtains their certificates; it buys the coal for the ship; it clears the ship at the Customhouse and attends to many other matters of detail, all of which form a part of its service to its principal. Will counsel argue that arranging with a stevedore to unload a ship is interstate commerce, or that procuring coal or other supplies for a ship is interstate commerce?

If so, we repeat, amplifying Judge Brewer's opinion, that counsel himself is engaged in interstate commerce *quoad* his services in such cases as this; that the stevedore and the boss drayman, who haul the cargo, are engaged in interstate commerce; that the warehouseman, who stores the cargo, is engaged in interstate commerce; that the man who sells motor trucks or mules to the boss drayman *quoad* such service as rendered herein is engaged in interstate commerce, and that no license taxes should be paid by any of these businesses. Follow the theory of the *McCall case* and it leads to a *reductio ad absurdum*.

The principle involved in the *Ficklin case*, which was decided two years subsequent to the *McCall case*, has been consistently adhered to by the Supreme Court of the United States.

Cases dealing with other phases of the same question are in our favor, particularly the very recent case of *American Manufacturing Co. v. St. Louis*, 250 U. S. 460, where the manufacturer's license tax was computed exclusively on the output of his factory, all sold in interstate commerce.

We repeat that the license must be a direct burden on and regulation of interstate commerce within the purview of a strict construction of Article I of the United States constitution, and that the most logical test of this proposition is that such commerce must in some way directly reflect that license as a burden or charge on the commerce itself or the principals engaged in that commerce.

Counsel in his brief says that many cases in the Supreme Court on the subject have approved the McCall case, listing 17 cases from that Court. We, too, have examined each and every one of these cases and submit that, barring one, to-wit, *Hopkins vs. United States*, 171 U. S. 573, the Court did not argue out at length or analyze the principles involved, but did nevertheless substantially interpret the McCall case just as we construe it, as a case where the tax was direct on the commerce

of the principal, and hence not remote, incidental or indirect, but must be reflected by that commerce of the principal as a charge thereon.

In *International Textbook Co. v. Pigg*, 217 U. S. 110, the business of plaintiff was the furnishing of courses of instruction by correspondence, and the question involved in the case was whether or not a state could require the plaintiff to take out a license to do its business in the state. The court quoted from *Crutcher v. Kentucky*, 141 U. S. 47, as deciding that regulations requiring express companies (and other companies doing an interstate business) to pay a license as a condition precedent to carrying on the business of interstate commerce were clearly a burden on that commerce, and then referred to the McCall case as being to the "same general effect"—that is to say, a tax laid directly on the company engaged in interstate commerce is a tax on that commerce itself.

In *Norfolk & Western R. R. v. Pennsylvania*, 136 U. S. 114, a Pennsylvania statute provided that no foreign corporation should have an office in the state for its employees, etc., unless it first obtained a license to do so. The plaintiff was a Virginia corporation operating a railroad which was a link in a through line of railroad over which freight and passengers were carried into and out of the state, and plaintiff was held to be engaged in interstate commerce. The court said that a state cannot, under guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce or impose burdens on such commerce within its limits, and referred to the McCall case as reciting some of the cases sustaining this proposition. It is to be noted that here the exclusion was of an office of a railroad company itself, and that the cost of the license fell directly on that interstate carrier.

In *Crutcher v. Kentucky*, 141 U. S. 47, as hinted above, a state statute required foreign express companies to take out a

license to do business in the state. The court said: "This, of course, embraces interstate business as well as business confined wholly within the State," and further on the court cites the McCall case along with others in which it had "decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce." It is to be noted that the company did "interstate business" as well as intrastate business, and that the license, borne directly by the company, necessarily affected its interstate business as well as its local business.

In *Pacific Express Company v. Seibert*, 142 U. S. 349, a Missouri statute required express companies to pay a tax based on receipts for sums earned and charged for business done within the state. The plaintiff contended that this statute imposed a tax on interstate commerce, and that to that extent it was forbidden by the Federal Constitution. The court declared that a state cannot lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce and amounts to a regulation of it which belongs to Congress; and the court cited the McCall case in support of that declaration; but it also said that the proposition of the plaintiff was unsound, because " a proper construction of the statute confines the tax which it creates to the intrastate business and in no way relates to the interstate business of the company. * * * * These provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other states and the State of Missouri, expressly limit the tax to receipts for the sums earned and charged for the business done within the State."

In *Hooper v. California*, 155 U. S. 653, the court says: that while the right of a foreign corporation to do business within a state other than its creation depends solely upon the will of such other state, is well settled as a general rule, there are exceptions which embrace a case where the corporation rests its right to engage in business therein upon the Federal nature of its business, such as the performance of a quasi-governmental function, or where it is a necessary instrument of interstate commerce, or its business constitutes such commerce; and the court simply refers to the McCall case as one of many in which the reasons for this exception are explained.

In *Brennan v. Titusville*, 153 U. S. 289, a manufacturer of picture frames in Illinois employed an agent to solicit orders for picture frames in other states. Upon receiving orders the agent forwarded them to the manufacturer, who shipped the frames to the purchasers, the price being collected by express companies or sometimes by the agent himself. A city ordinance sought to charge this manufacturer's sales agent a license for the privilege of soliciting orders. The court said: "That this license tax is a direct burden on interstate commerce is not open to question;" and later referred to the McCall case as "replying to the objection that this (the license tax on McCall) only indirectly affected the commerce of the road." This case clearly recognizes that the tax in order to be unconstitutional must have a direct bearing on interstate commerce, and the McCall case is cited to that effect.

In *Williams v. Fears*, 179 U. S. 270, a revenue act of Georgia levied a specific tax upon many occupations, including "emigrant agents," meaning persons engaged in hiring laborers to be employed beyond the limits of the state. The court said: "The real question is, does this law amount to a regulation of commerce among the states? To answer that question in the affirmative is to hold that the emigrant agent

is engaged in such commerce, and that this tax is a restriction thereon." The court then refers to the McCall case by saying that in that case "the business was *directly* connected with interstate commerce, and consisted wholly in carrying it on. The agent was the agent of the transportation company, and he was acting solely in its interests." And finally the court decided that the imposition of the tax on the emigrant agent fell within the distinction between interstate commerce, or an instrumentality thereof, and the mere incidents which may attend the carrying on of such commerce, and that he could be charged a license."

In *Stockard v. Morgan*, 185 U. S. 27, the court refers to the McCall case as following the *Robbins case*, 120 U. S. 489, a leading case holding that interstate commerce cannot be taxed at all by a state; but the court also refers to and distinguishes and sustains the Ficklen case, showing that in the case of Stockard, "his principals are specific parties, firms or corporations, all non-residents of Tennessee and residents of other states in the United States, and *he does not represent or hold himself out as representing the public in general*, or negotiate or sell for any resident of Tennessee" (p. 29), whereas "a material fact in the (Ficklen) case was that Ficklen had taken out a general and unrestricted license to do business as a broker, and he was thereby authorized to do any and all kinds of commission business, and therefore became liable to pay the privilege tax enacted. Although Ficklen's principals happened in the year 1887 to be wholly non-residents, the fact might have been otherwise, as was stated by the Chief Justice, because his business was not confined to transactions for non-residents."

In *Western Union Tel. Co. v. Kansas*, 216, U. S. 1, an act required plaintiff company to pay a given per cent of its authorized capital as a condition of its right to continue to do a domestic business in Kansas. The court held that this require-

ment, by its necessary operation, directly burdened and embarrassed interstate commerce, and cited the McCall case in support of its decision.

In *Saulte Ste Marie v. International Transit Co.*, 234 U. S. 341, a city ordinance exacted a license fee for a ferry between Michigan City and the Canadian shore. The court held this to be unconstitutional, citing the McCall case for the doctrine that no license can be exacted by a state for carrying on interstate commerce.

In *Kansas City Ry. v. Kansas*, 240 U. S. 227, a state statute levied a franchise tax upon the right of corporate existence. Plaintiff was a railroad corporation organized under the laws of that state. The court after stating that interstate commerce could not be taxed by states, and citing the McCall case in support of that doctrine, nevertheless held that states could levy a corporate franchise tax on a domestic corporation carrying on interstate commerce.

In *Cheney Brothers Co. v. Massachusetts*, 246 U. S. 153, the plaintiff, a Connecticut manufacturer, maintained a selling office in Massachusetts, with salesmen soliciting orders in New England. The goods were shipped to purchasers directly by the Connecticut office, which also directly paid the salesmen, rent and other expenses of the Massachusetts office. The court said that this was not a local business as distinguished from interstate commerce and, holding that it was immune from state taxation, cited the McCall case.

The case of *Armour & Co. v. Virginia*, 246 U. S. 1, was referred to during the argument by Mr. Justice O'Niell. A Virginia statute imposed a license on merchants based on the amount of purchases, including as such merchandise manufactured by the licensee and sold in the state, but excluding manufacturers taxed on their capital. Plaintiff, a New Jersey corporation, engaged in Virginia in selling their packing house

products, through agencies which they established. The suit grows out of the license claimed from the plaintiff. Among other objections, they charged that the statute was discriminatory, because it excluded from liability persons who manufacture commodities in Virginia and sold them there, and that as to the goods plaintiff shipped into and sold in Virginia the license was a direct burden on interstate commerce. The court held (pp. 5, 6) that the statute was not discriminatory since the exclusion from license was open to all, whether citizens of Virginia or not, and hence, plaintiff was at no disadvantage; that the license applied to manufacturers in Virginia if they sold goods by them manufactured at a place other than the place of manufacture, and that disadvantage to plaintiff was a mere indirect consequence of a lawful exercise of the state's authority and was not a direct burden on interstate commerce.

So far as the above case applies herein it is distinctly in our favor. If a license on Armour & Company for goods brought into Virginia and there sold through their agents directly (and your attention is called to the fact that the clear inference is that these were their special employed agents and representatives, not independent brokers selling their meats on commission is an indirect or remote tax or burden on interstate commerce, then the same reasoning applied to this case would show equally that the license herein, not against the principals, such as Armour & Company, but against an independent and general agent, is even a more indirect and remote tax on interstate commerce, if it could be considered such at all.

In closing, we beg to call your attention to one of the ablest, most logical and best reasoned cases on this whole subject, to-wit, *Hopkins v. United States*, 171 U. S. 578. A reading of this case will clarify the situation more than will the reading of the average half-dozen cases on the subject.

The purpose of the action was to dissolve the Kansas City Livestock Exchange and enjoin its members from continuing an unlawful combination in restraint of trade. The business of its members was to receive individually consignments of live stock not only from Kansas and Missouri, but from other states as well, and to feed such stock and prepare it for the market, dispose of it, and receive the proceeds thereof from the purchaser, pay the owners their proportion of the proceeds, after deducting charges, expenses and advances. (Note the peculiar parallel to the cases at bar.) The members solicited consignments from owners and made them advances thereon. If appellants by collecting freight for steamships, paying their local expenses and remitting the balance are thereby engaged in interstate commerce, how much more so were Hopkins and others, who in addition to doing the same things actually advanced heavily on live stock and so in addition had a direct interest in the shipment to the extent of such advances? To such an extent that the court says (p. 580): "The market is largely sustained by means of the money thus advanced to cattle raisers by the defendants, and that Kansas City is the only place for miles about, which constitutes an available market for the purchase and sale of live stock from the large territory located in the states and territory already named."

The question was, were the defendants engaged in interstate commerce. The court answers (p. 587):

> "Is it interstate commerce in the sense of that word as it has been used and understood in the decisions of this court? Or is it a business which is an aid or a facility to commerce, and which, if it affects commerce at all, does so only in an indirect and incidental manner?"

Further:

> "The sale or purchase of livestock as commission merchants at Kansas City is the business done, and its

character is not altered because the larger portion of the purchases and sales may be of live stock sent into the state from other states and from the territories. * * * * If an owner of cattle in Nebraska accompanied them to Kansas City and there personally employed one of these defendants to sell the cattle at the stockyards for him *on commission*, could it be properly said that such defendant in conducting the sale for his principal was engaged in interstate commerce? * * * * We think not. On the contrary, we regard the services *as collateral* to such commerce and in the nature of a *local aid or facility provided for the cattle owners* toward the accomplishment of his purpose to sell them."

Apply the same reasoning to our case and it must be concluded that in licensing plaintiff in error, so far from directly regulating or taxing the business of foreign ships, the City of New Orleans is affording to each and every client of plaintiff in error and also "*a local aid or facility*" toward the accomplishment of their purpose to engage, deliver and sell their cargoes in the port of New Orleans.

The court then further says that the character of the transaction is not altered if the owner, instead of accompanying the cattle, sends them by common carrier consigned to one of the defendants in Kansas City with instructions to sell them and render him an account of the proceeds. It is urged, says the court (p. 589), that because defendants promote the business of selling cattle upon consignment from other states, because they send agents into other states to solicit business for them, because they loan money to the cattle owners and take mortgages upon the cattle, hence advancing a portion of the purchase price of the cattle to be sold by paying drafts drawn upon them by the shippers, that all such acts constitute interstate commerce. Answering this, the court said (p. 590):

"All this is done as a means towards an end; as an inducement to the cattle owner to give one of the defend-

ants the business of selling the cattle for him." (All that appellants do is a means towards the end of inducing the steamship companies to give them their business of engaging cargoes and unloading the same and doing other things.) * * * * * "That business is not altered in character because of the various things done by defendants for the cattle owner in order to secure it." * * * * "They do not purchase the cattle themselves; they do not transport them. * * * * Thus everything at last centers at the market at Kansas City, and the charges are for services there, and there only, performed."

"The selling of an article at its destination, which has been sent from another state, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce. * * * * Granting that the cattle themselves, because coming from another state, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce." (P. 591.)

"The seller," says the court, simply aids the owner in finding a market, "but the facilities thus afforded the owner by the agent are not of such a nature as to thereby make that agent an individual engaged in interstate commerce * * * * Charges for the transportation of cattle between different States are charges for doing something which is one of the forms of and which itself constitutes interstate trade or commerce, while charges or *commissions* based upon services performed for the owner in effecting the sale of the cattle are not directly connected with, as forming part of, interstate commerce, although the cattle may have come from another state. Charges for services of this nature do not immediately touch or act upon nor do they

directly affect the subject of the transportation. Indirectly and as an incident they may enhance the cost to the owner of the cattle in finding a market, or they may add to the price paid by a purchaser, but they are not charges which are directly laid upon the article in the course of transportation, and which are charges upon the commerce itself; they are charges for the facilities given or provided the owner in the course of the movement from the home situs of the article to the place and point where it is sold. (p. 592) * * * * There must be some direct and immediate effect upon interstate commerce in order to come within the act. The State may levy a tax upon the earnings of a commission merchant which were realized out of the sales of property belonging to non-residents, and such a tax is not one upon interstate commerce because it affects only incidentally and remotely although certainly." Citing *Ficklen vs. Shelby County*, 145 U. S. 1.

This case was decided about ten years after the McCall and Ficklen cases, and if the argument so far has not sustained our theory that the tax is not directly on interstate commerce, as it would be if the cattle owner instead of the general agent had been charged the tax, and hence is not unconstitutional, we cannot find any stronger language to sustain our theory and argument.

For the above reasons we submit that if by any stretch of the law, the license tax on plaintiff in error, engaged in the business of a steamship agency—a general independent agency in the City of New Orleans—can be said to affect interstate commerce at all, it is clear that it does so only remotely and indirectly and does not amount to a burden on or regulation of interstate commerce within the contemplation of Article 1 of the Federal Constitution. We repeat that the practical proof that this license is not a direct tax on interstate commerce is that neither the business of the steamship companies (the only one engaged

in interstate commerce), nor their books, nor their expense account, nor their receipts, nor their profits, show or can show, according to the evidence before this court (Tr. p. 19), that the steamship companies have ever paid one penny of license either directly or indirectly to this city for carrying on their interstate commerce in New Orleans.

Therefore we respectfully submit that the judgment of the Supreme Court of Louisiana should be affirmed.

Respectfully submitted,

IVY G. KITTREDGE,
City Attorney.

W. CATESBY JONES,
Assistant City Attorney.

Counsel for the City of New Orleans,
Defendant in Error

January, 1924.

ERROR to a judgment of the Supreme Court of Louisiana, which affirmed a judgment for the City of New Orleans in an action for a license tax.

Mr. George H. Terriberry, with whom *Mr. W. W. Young* and *Mr. Joseph M. Rault* were on the briefs, for plaintiff in error.

Mr. W. Catesby Jones, with whom *Mr. Ivy G. Kittredge* was on the brief, for defendant in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The City of New Orleans brought this action in a Louisiana state court to recover from defendant (plaintiff in error here) a license tax of $400, imposed, for the year 1922, upon its business of steamship agent. The demand was resisted on the ground that the tax was in contravention of the Commerce Clause of the Constitution of the United States in that it was an interference with and tax upon interstate and foreign commerce. Defendant was regularly employed as agent for four steamship lines, under a contract fixing its compensation on the basis of commissions, calculated upon the gross amount of freight charges collected by it for each company. In addition, defendant occasionally represented other ship owners. All were exclusively engaged in interstate or foreign commerce, and defendant's business was confined solely to representing principals so engaged in such commerce. The service rendered consisted of soliciting and engaging cargo, nominating ships for carrying it, arranging for its delivery on the wharf, issuing bills of lading under the name of ship owner or charterer, arranging for stevedores for loading and discharging cargo, collecting freight charges, paying ships' disbursements, attending to immigration service and assisting generally in matters of local customs and regulations.

Freight moneys collected, after deducting commissions, were remitted to the owners or charterers. As such agent, defendant was authorized to solicit cargo and quote freight rates and to issue receipts in the name of its principal for cargo delivered on the wharf.

Upon these facts the trial court held that defendant's business was local in character and subject to the tax. Upon appeal, this judgment was affirmed by the State Supreme Court. 152 La. 497.

The State Supreme Court thus stated the necessity and character of the agent's duties:

"The business of steamship agents is an extensive business in New Orleans, as it is in every large seaport. As a separate or an independent business, it is a result of the development of the country's commerce with foreign nations and among the several states. In the early days, when time was not so much the object or subject of economy as it is today, every ship's captain, for his own ship, discharged the duties and rendered the services for which local steamship agents are employed nowadays. But it would be impracticable now for a ship's captain to remain with his ship in port long enough to attend to the many matters which the local steamship agents can and do attend to for a ship at sea or in a foreign port. The business of steamship agents is therefore a necessary adjunct to commerce on the high seas."

This Court has had frequent occasion to consider and determine the effect of taxes of the same general character as that here involved, and, for present purposes, we find it unnecessary to do more than refer to the general and well established rule, which is that a State or state municipality is powerless to impose a tax upon persons for selling or seeking to sell the goods of a nonresident within the State prior to their introduction therein, *Stockard* v. *Morgan*, 185 U. S. 27; or to impose a tax upon persons for securing or seeking to secure the trans-

portation of freight or passengers in interstate or foreign commerce. *McCall* v. *California*, 136 U. S. 104. The latter decision controls the present case. There the agent of a railroad company was engaged in San Francisco in the business of soliciting and inducing persons to travel from the State of California into and through other States to New York City, over the line of railroad which he represented. It was held that the business of the agent constituted a method of securing passenger traffic for the company, and therefore (p. 109) the tax was one "upon a means or an occupation of carrying on interstate commerce, pure and simple." The only difference between that case and this is that there the agent was engaged in seeking interstate passenger business, while here the agent was engaged in seeking interstate and foreign freight business. Plainly, as pointed out in the *McCall Case* (p. 109), the principle is the same.

Ficklen v. *Shelby County Taxing District*, 145 U. S. 1, is relied upon to justify the tax, but quite clearly it does not do so. The facts of that case differ materially from those of the *McCall Case* and those with which we are here dealing. In the *Ficklen Case* complainants were general merchandise brokers. They paid the initial tax imposed by the Tennessee law for the year 1887 and received and held throughout the year a general and unrestricted license to do business as such. They thereby became liable, under the statute, to pay an additional privilege tax in part graduated according to the amount of commissions received. It happened that, during 1887, the principals of one complainant were wholly nonresident and those of the other, largely so. The opinion pointed out that the fact might have been otherwise then and afterward, since their business was not confined to transactions for nonresidents. At the expiration of the year complainants applied for a renewal of their licenses, which was refused because they had made no return of their commis-

sions and no payment of the tax, as required. In deciding the case, stress was laid upon the fact that they had taken out a license under the law to do a general commission business, had given bond to report their commissions during the year and to pay the required percentage thereon; and, agreeing with the state court, it was said that resort to a judicial remedy could not be had because the authorities had refused to issue a license for the ensuing year without payment of the stipulated tax. Concluding the opinion, it was said: "What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record." The decision rests largely upon the elements above stated, as was pointed out by Mr. Justice Brewer in *Brennan* v. *Titusville,* 153 U. S. 289, 307:

"It was held that the tax was an entirety, and was not affected by the variable and adventitious results of business from year to year. . . . In other words, the tax imposed was for the privilege of doing a general commission business within the State, and whatever were the results pecuniarily to the licensees, or the manner in which they carried on business, the fact remained unchanged that the State had, for a stipulated price, granted them this privilege. It was thought by a majority of the court that to release them from the obligations of their bonds on account of the accidental results of the year's business was refining too much, and that the plaintiffs who had sought the privilege of engaging in a general business should be bound by the contracts which they had made with the State therefor."

The case is near the border line and has been deemed exceptional. *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 296; *Stockard* v. *Morgan, supra,* pp. 34-37.

The present case is sufficiently differentiated by the fact that the agent here neither did nor held itself out as ready to do a general business, partly local and partly interstate and foreign, but confined itself exclusively to the latter.

Reversed.

MR. JUSTICE BRANDEIS dissenting, with whom MR. JUSTICE HOLMES concurs.

From the multitude of cases, this general rule may be educed.[1] The validity of a state tax under the commerce clause does not depend upon its character or classification. It is not void merely because it affects or burdens interstate commerce. The tax is void only if it directly burdens such commerce, or (where the burden is indirect) if the tax discriminates against or obstructs interstate commerce. In this case there is no claim that interstate commerce is discriminated against or obstructed. The contention is that the tax imposes a direct burden. Whether the burden should be deemed direct depends upon the character of plaintiff's occupation and its relation to interstate transactions.

The occupation tax laid by New Orleans is fixed in amount;—businesses being classified into several grades according to the amount of business done. The Texas Transport & Terminal Company falls within the highest grade—those whose receipts exceed $100,000 a year—and, thus, it is taxed $400 a year. The business is what is called a steamship agency. The main office is in New York City. It has branches in New Orleans and in five other ports of the United States. It is a wholly independent concern. No ship owner has an interest in it; and it has no interest in any ship which it serves. Some

[1] Compare Thomas Reed Powell, "Indirect Encroachment on Federal Authority by the Taxing Powers of the States," 31 Harv. Law Rev. 321, 572, 721, 932; 32 Harv. Law Rev. 234, 374, 634, 902.

of these are regular ocean liners; others are casual tramp ships. The services rendered include, among other things, arranging with independent stevedore concerns for discharging and loading cargoes; arranging with independent dealers for bunkering, that is, buying fuel and oil; making provision for fitting ships for any special or peculiar cargo; making provision for compliance with the immigration and customs laws; and paying the ship's disbursements. For these, and the other services of soliciting cargoes, arranging for their delivery, and collecting payment for freight, the company is compensated. Usually the compensation is measured by a percentage on the gross freight charges collected. Sometimes it is a lump sum for each ship served. These comprehensive services require, for their efficient performance, the employment of a steamship agency, or its equivalent, whatever the home port of the ship or the principal place of its owner's business.

It is settled law that interstate commerce is not directly burdened by a tax imposed upon property used exclusively in interstate commerce, *Transportation Co.* v. *Wheeling*, 99 U. S. 273, 284; *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299, 306; or by a tax upon net income derived exclusively from interstate commerce, *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321; *Shaffer* v. *Carter*, 252 U. S. 37, 57; compare *Peck & Co.* v. *Lowe*, 247 U. S. 165; or by an occupation tax, fixed in amount, although the business consists exclusively of selling goods brought from another State. *Wagner* v. *City of Covington*, 251 U. S. 95. On the other hand, the burden is deemed direct, where the tax is upon property moving in interstate commerce, *Champlain Realty Co.* v. *Brattleboro*, 260 U. S. 366; or where it lays, like a gross-receipts tax, a burden upon every transaction in such commerce "by withholding, for the use of the State, a part of every dollar received in such transactions,"

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292, 297; or where an occupation tax is laid upon one who, like a drummer or delivery agent, is engaged exclusively in inaugurating or completing his own or his employer's transaction in interstate commerce. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Davis* v. *Virginia*, 236 U. S. 697.

The New Orleans tax is obviously not laid upon property moving in interstate commerce. Nor does it, like a gross-receipts tax, lay a burden upon every transaction. It is simply a tax upon one of the instrumentalities of interstate commerce. It is no more a direct burden, than is the tax on the other indispensable instrumentalities; upon the ship; upon the pilot boat, which she must employ; upon the wharf at which she must load and unload; upon the office which the owner would have to hire for his employees, if, instead of engaging the services of an independent contractor, he had preferred to perform those duties himself. The fact that, in this case, the services are performed by an independent contractor having his own established business, and the fact that the services rendered are not limited to soliciting, differentiate this case from *McCall* v. *California*, 136 U. S. 104. If these differences are deemed insufficient to distinguish that case from the one at bar, it should be frankly overruled as inconsistent with the general trend of later decisions.

TEXAS TRANSPORT & TERMINAL COMPANY, INCORPORATED, *v.* CITY OF NEW ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 141. Argued January 4, 7, 1924.—Decided February 18, 1924.

A state license tax cannot be laid upon the business of a corporation employed as agent by owners of vessels engaged exclusively in interstate and foreign commerce, where its business is confined to, and is a necessary adjunct of, their commerce, consisting in the soliciting and engaging of cargo, nominating vessels to carry it, arranging for delivery on wharf and for stevedores, issuing bills of lading, collecting freight charges, paying ships' disbursements, and other incidental matters. *McCall* v. *California*, 136 U. S. 104, followed. *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, distinguished.

152 La. 497, reversed.